SYARIKAT BEKERJASAMA-SAMA SERBAGUNA SUNGAI GELUGOR DENGAN TANGGUNGAN BERHAD

v.

MAJLIS PERBANDARAN PULAU PINANG

COURT OF APPEAL, KUALA LUMPUR
DATO' ZAKARIA MOHD. YATIM JCA
DATO' CHAN NYARN HOI JCA
DATO' MAHADEV SHANKAR JCA
[CIVIL APPEAL NO: P-02-58-1994]
2 APRIL 1996

ADMINISTRATIVE LAW: *Judicial review - Inferior tribunals - Application for certiorari - Discretion of Court - Governing principles - Whether there was abuse of power - Whether there was an error of law being committed - Whether there was denial of legitimate expectation - Whether there was breach of natural justice - Whether decision irrational and unjust - Allegation of breach of natural justice and bias against Local Authority - Whether Court dutybound to examine allegations to see if certiorari should lie.*

ADMINISTRATIVE LAW: *Judicial review - Application for leave to issue certiorari to quash decision of Local Authority - Right to certiorari - Whether lost upon existence of alternative remedies - Whether dependant upon whether there was any abuse of power by Local Authority - Town and Country Planning Act 1976 ss. 22, 23, 24(5).*

ADMINISTRATIVE LAW: *Administrative act - Whether could be partially bad - Whether severable - Whether distinction to be made between that which is void and that which should be cured by judicial review - Whether Court could quash the bad part and leave the good standing.*

CIVIL PROCEDURE: *Grounds of judgment - Decision recorded in writing and signed by Judge - Whether a grounds of judgment - Judge supplying additional grounds of judgment after filing of notice of appeal - Whether two separate grounds of judgments - Whether undesirable - Rules of the Federal Court 1995 r. 57(4)(e) - Rules of the Court of Appeal 1994 r. 18(4)(d) & (e) - Subordinate Courts Rules 1980 O. 49 r. 2(3) - Courts of Judicature Act 1964 - Rules of the High Court 1980.*

LOCAL AUTHORITY: *Town and country planning - Housing project - Additional condition to planning permission - Whether an error of law - Whether an abuse of power - Extension of planning permission - Extension granted for less than a year - Whether local authority had acted fairly - Power of Court to enlarge time - Town and Country Planning Act 1976 ss. 23, 24 - Courts of Judicature Act 1964, Article 8 to Schedule thereto.*

WORDS & PHRASES: *"As it thinks fit" - Town and Country Planning Act 1976, s. 24(5).*

This was an appeal against the decision of the High Court refusing leave to the appellant to apply for an order of *certiorari* to quash a decision made by the respondent, on the ground that the existence of a domestic remedy by way of an appeal, was fatal to the application for leave.

The appellant co-operative society is the owner of a piece of land in Penang. The appellant had wanted to develop the said land and to build thereupon, *inter alia*, some 183 units of low-cost flats meant for sale to its members. In April 1990, after having submitted its application for planning permission and other documentations to the respondent, the appellant executed an agreement with a housing developer, one Rethiko Sdn. Bhd. ('Rethiko'). *Inter alia*, the agreeement stipulated that Rethiko would construct and manage the project for some stated considerations and that, of the proposed number of units to be built, 110 would comprise of two bed-room flats while the rest would comprise of three bed-room units to be sold at RM32,000 and RM45,000 respectively. It was not disputed that this proposed pricing structure was let known to the respondent.

The facts showed that to control the high price of housing in the State, a certain guideline, known as *"Guidelines for the Development of Low Cost Flats"*, had been passed by the State Authority on 7 December 1978, and again on 12 March 1983, in which it was stated that the cost of a low-cost house should be *"about RM25,000"*. This apart, the State Authority had also come out with another guideline, *vide* its *Green Book "Structure Plan 1987"*, in which, *inter alia*, the respondent was directed to ensure that a minimum 30% of the housing units in housing projects in the State would comprise of low-cost housing costing *"RM25,000 per unit and less"*. This 30% requirement, however, was not mentioned in the guideline passed in 1978 and 1983.

By a letter dated 18 June 1991, apparently with the aforesaid guidelines in mind, the respondent requested that the appellant amend its plan for the project, asking in effect that the appellant comply with certain town planning requirements. Attached to the request was a guideline entitled *"Guidelines for low-cost flats"*, in which item 11 thereof practically required that the appellant allocate 30% of the project to low-cost houses, *"to be sold at a cost not exceeding RM25,000 per unit in accordance with Government Policy"*.

As expected, the appellant forthwith objected to item 11. Be that as it may, on 7 September 1991, the respondent advised the appellant that planning permission for a period of one year for the project had been granted (effective 6 September 1991 to 5 September 1992), purportedly pursuant to r. 10(1) of

the Planning Control (General) Rules 1990 and s. 22(3) of the Town and Country Planning Act 1976 ('the Act'). The permission listed out seven "requirements" in all, but no mention was made of any price restriction.

The appellant, in the meanwhile, entered into a supplemental agreement with Rethiko, by which they revised the pricing structure of the proposed flats, so that the two bed-room and three bed-room units would each be sold at RM38,000 and RM62,000 respectively. A petition was submitted to the respondent by the affected members of the appellant, objecting to the price hike, but the new prices, nonetheless, were ratified by the respondent at a Special Meeting held in January 1992. Subsequently, on 21 February 1992, the respondent formally approved the plan, telling all and sundry, by letter dated 24 February 1992, that it had no authority to make any decision with regard to the petition, and further, that the matter was an internal matter between the buyers and the developer. What followed was that the appellant had sold 70 of the two-bed-room units and 33 of the three bed-room units at RM35,000 and 62,000 respectively.

As the said planning permission was due to expire on 5 September 1992, the appellant applied for an extension of the same on 2 September 1992. The respondent considered the application on 20 July 1993, i.e. about 10 months later, and following that, on 30 July 1993, informed the appellant that an extension, effective 6 September 1992 to 5 September 1993, was granted. The extension granted, thus, was for a period of 47 days from the date of decision, and 35 days from the date the appellant received the notification. On top of this, the extension was also made subject to several additional conditions, one of which was that the appellant was to *"complete 30% low-cost at RM25,000 per unit"* (the second condition).

On 10 August 1993, the appellant, having already sold some of the units at prices much in excess of RM25,000 following the respondent's approval of the plan on 24 February 1992, formally appealed against the second condition. On 20 September 1993, in rather absolute terms and giving no reasons therefor, the respondent rejected the appeal. In the circumstances, on 11 October 1993, the appellant filed an application to the High Court for leave to apply for an order of *certiorari* to quash the respondent's decision of 20 September 1993, on the grounds that it was a nullity, and that the decision was against natural justice, *ultra vires*, unreasonable and *mala fides*.

Before the learned Judge ('the trial Judge'), despite the appellant's argument that judicial review was the most effective and convenient remedy, and that the Court's jurisdiction was not at all affected by the existence of the alternative domestic appeal pursuant to s. 23(1) of the Act, the trial Judge ruled that the appellant's failure to avail itself of such alternative statutory remedy was fatal, and so dismissed the application. Apparently, the trial Judge was also of the opinion that by virtue of s. 24(5) of the Act, it could not be shown that there was a clear lack of jurisdiction when the second condition was imposed.

The appellant appealed to the Supreme Court, wherein the issue relating to the appellant's failure to appeal, which the trial Judge ruled as being critical to the dismissal of the application for leave, was again fully argued. The appeal was allowed, and in consequence, on 24 February 1994, the Supreme Court ordered that the decision given by the trial Judge be set aside, that the appellant be granted leave to apply for *certiorari* and that the substantive motion of the application be heard by another Judge ('the Judge').

At the hearing of the motion that followed, however, the respondent again raised the issue of the alternative remedy, contending that it was fatal to the motion. The appellant argued that the issue was already *res judicata* in view of the arguments in, and the order of the Supreme Court. The Judge however ruled that the Supreme Court, going by its order, had not decided on the issue of alternative remedy, and the issue, therefore, was still open for ventilation. The appellant's motion, subsequently, was dismissed by the Judge. Against this dismissal, the appellant has now appealed.

The facts showed that pursuant to the filing of the notice of appeal by the appellant, the Judge, for reasons unclear, had supplied further grounds of judgment, notwithstanding that he had recorded his earlier decision in writing and had signed the same. The facts further showed that, due to the need to evict squatters from the land, including a dweller by the name of Rabeah, the appellant had to engage in some negotiations with the respondent's Council member by the name of Ahmad Miftah Khan ('Khan'), who happened to be Rabeah's uncle. The result was that, the appellant had offered for free to Rabeah a two-room flat, in lieu purportedly of demolition of Rabeah's house. As it transpired, however, Khan had wanted a three bed-room flat for Rabeah and so rejected the appellant's two bed-room offer. It was not in dispute that Khan had sat at the Sub-Committee meeting of the respondent on 5 September 1993 that rejected the appellant's appeal, as well as at the Full Committee meeting on 20 September 1993 which also rejected the said appeal.

Before the learned Judges of the Court of Appeal, the primary issues that arose were:

(1) whether the grounds of decision as supplied by the Judge after the filing of the notice of appeal constituted a judgment.

(2) Whether in view of the decision of the Supreme Court, the issue of alternative remedy before the Judge was already *res judicata.*

(3) whether the right to appeal in this case was fatal to the application of judicial review.

(4) whether the respondent had the power to impose condition that 30% of the project should consist of units pegged to a minimum of RM25,000.

(5) whether the respondent had a legitimate expectation to have the said planning permission renewed on the same terms for another year and not for 47 days or 35 days as was the case herein.

(6) whether the respondent was guilty of abuse of power or error of law in imposing the second condition.

(7) whether the conduct of Miftah Khan had vitiated the decision of the respondent and if so to what extent.

(8) whether the appellant's conduct was such that discretionary relief ought to be refused.

Held:

Per Mahadev Shankar JCA (delivering the judgment of the Court):

[1] The reasons given by the Judge for the dismissal of the application, and his decision to do so on 5 August 1994 were recorded in writing by him in his Notes and signed. This was therefore a written judgment not merely in the sense of an "order" but also in the sense of an order coupled with the grounds therefor.

[2] Except under the slip rule, a Judge became *functus officio* after judgment is delivered and the order drawn up. It is undesirable to have two written judgments, as supplementary judgment, given after a written judgment has been delivered, may well affect judicial credibility because they could easily be mistaken for the wisdom of hindsight rather than representing the actual decision making process.

[3] The respondent's submission that in granting leave the Supreme Court had merely acted on its own previous decisions that at the leave stage a Judge should not critically evaluate the merits of the application for leave, and therefore the fatality of the alternative remedy in the instant case was open for ventilation the third time, cannot be sustained. Quite simply, if the Supreme Court thought that the availability of the alternative remedy was fatal it would not have allowed the appeal. The issue of alternative remedy which the respondent raised before the Judge after the Supreme Court order of 24 February 1994, was clearly *res judicata*.

[4] The order of the Supreme Court did not contain the word "merits". It nonetheless required consideration of all the issues raised in the substantive motion. As it is, an application on the merits is one which depends on the inherent justice of the appellant's contention and it turns on the substantial facts of the case as distinguished from technical objections or collateral matter.

[5] Faced with voluminous affidavits, and intractable issues of administrative law, the route taken in the Court below had doubtful attraction of the line of least resistance. This was regrettable because having directed himself that the judgment of the Supreme Court required him to deal with "the entire merits" of the application the Judge disposed of the appeal not on the entire merits but on what was in effect a technicality which was no longer open for consideration.

[6] Whether a grievance should be redressed only by way of appeal, or by way of judicial review regardless of a domestic remedy being available, must turn on whether the complaint is one of "abuse of power". The term "abuse of power" has to be used in its widest sense and must equate with "an error of law" as that term is used today (e.g. as used in *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union*), so as to include a denial of legitimate expectation, a breach of natural justice or a making of a decision which is irrational and unjust, *inter alia*. In this respect, the words *"clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice"* which occur in the core passage of *Jagdis Singh* cannot be treated as exhaustive but only as a series of open ended instances in which the Court will interfere.

[7] The principle applicable in this country is that the availability of an alternative domestic remedy will not shut out an application for judicial review where the complaint made to the Court is one of "error of law" or "abuse of power" going to the legality of the conduct of the inferior tribunal or other decision-making authority, unless the domestic remedy was intended for and in fact constitutes a wholly adequate machinery for the just disposal of the complaint in question. The situation today is that, if breach of natural justice and bias are alleged, the Court will examine those allegations to see if *certiorari* should lie.

[8] In any case, on the facts, the respondent's claim on alternative remedy is not sustainable as, although, *de jure* the statute did confer such a remedy against the decision made on 20 July 1993, *de facto* the respondent had fatally compromised that right by entertaining the appellant's letter by way of appeal for review dated 10 August 1993 and subsequently delaying its response until 23 September 1993 by which time the time period for appealing had lapsed. The respondent's decision on 20 September 1993 was not made under s. 22(3) read with s. 24(5) of the Act and therefore was not appealable under s. 23. The result was that the appellant had no domestic remedy left and judicial review was the only way to go.

[9] Guidelines such as the *"Guidelines for the Development of Low Cost Flats"* are only a statement of principles. In the absence of any suggestion that the same were repealed this Court can only act on the basis that the said guidelines passed on 12 March 1983 were still in force in 1991. These guidelines clearly permit some flexibility in the cost of low cost flats i.e. "lebih kurang RM25,000"or *"about RM25,000"*. Against this backdrop the "Requirements of the Respondent's list of 18 June 1991" cannot be treated as non-negotiable.

[10] As of 6 September 1991, the respondent knew that the proposed price for the respective units of flats was RM32,000 and RM45,000, that the appellant did not agree to requirement 11 in the respondent's list of 18 June 1991 that the price should not exceed RM25,000, and that these prices were a private internal arrangement between the members of a Co-operative and the party they had chosen as their developer. In other words the price had been agreed by the prospective purchasers through their lawfully elected representatives. With all these knowledge the fact must be that the respondent did not make it a condition, when it granted the planning permission, that 30% of the 183 flats should be sold at a cost not exceeding RM25,000. The wording of s. 22(3) of the Act makes it crystal clear that to amount to a condition it must be so incorporated as to make the planning permission granted subject to such condition, and that such condition must appear in the prescribed form. This was not done.

[11] Assuming that the respondent had power to impose the 30% condition, that power was clearly not exercised on 6 June 1991. Nor was it exercised after the appellant's members petitioned the respondent that a further increase was proposed. Indeed by its letter of 24 February 1992, the respondent represented that the increased prices were purely an internal matter for the appellant. As it was, no one complained about this decision.

[12] The phrase "legitimate expectation" may be used in various distinct senses. It may be used to denote a substantive right which is established when there is a clear representation by the administrator or public body which could be reasonably relied upon by the claimant. Employed in this sense, the doctrine is akin to an estoppel. Secondly, legitimate expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness. In this sense, the law recognises that the interest cannot properly be withdrawn or denied without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision. Thirdly, the concept of legitimate expectation may be used to refer to the fair procedure itself. In other words, it is contended that the claimant

has a legitimate expectation that the public body will act fairly towards him. The final category of legitimate expectation encompasses those cases in which it is held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some specific promise or practice. Fairness requires that the public authority be held by it.

[13] Bearing in mind the aforesaid concept in its first sense, the said planning permission granted the appellant a substantive right. The respondent's Council's decision of 14 February 1992 was a clear representation that the appellant was not pegged to selling its units at prices not exceeding RM25,000. The appellant relied on the representation and accordingly fixed the new prices and in fact proceeded to sell them at the said new prices. Since the respondent was aware of these prices and had stated a Council's decision that the prices were an internal matter for the appellant, the respondent was not entitled to change its decision so as to adversely affect the claimant. There is thus an estoppel here.

[14] Using the concept in the second sense, the respondent should have given advance notice of its intention to impose the second condition because the rules of natural justice demanded it. It is possible that if a fair opportunity had been given to make representations the second condition would not have been imposed on 20 July 1993.

[15] As for the third sense, it cannot be said that the respondent acted fairly because the decision making process was fatally flawed. It ought to be noted that there is statutory requirement for the proceedings of all the respondent's committee meetings to be minuted. No minutes however have been produced of these, and consequently, why it took almost 11 months for the respondent to consider the extension, what views were expressed by the Councillors at these meetings, for the imposition of the second condition and the rejection of the appeal, has not been disclosed to the Court.

[16] The words "as it thinks fit" in s. 24(5) of the Act cannot be given their literal meaning so that the planning authority can do as it pleases. It is trite that, whatever conditions imposed on or variations made to the planning permission, must relate to the permitted development. The planning permission here was for 190 units only and the new conditions imposed had to relate to those 190 units.

[17] Bearing in mind the true import of s. 24(5) aforesaid, the averment of the respondent's Planning Director that the intended meaning of the second condition was not that 30% of the 190 units should be sold below RM 25,000 but that the appellant was permitted to build a further 30% residential units (i.e. 55 units more) for sale at RM25,000, is not supportable. As it was, the appellant had not applied for a variation of

the planning permission but only for extension. By seeking to compell the appellant to build another 55 units, the respondent was not granting an extension of the planning permission granted for 190 units, but forcing the appellant to put up a new project for 238 units on the said land. In the circumstances, in imposing the second condition, the respondent committed an error of law. That apart, the manner in which the respondent went about it constituted an abuse of power.

[18] So far as the question of bias is concerned, the test here is not whether there was actual bias on the part of Khan but whether even if Khan was as impartial as he could be, right minded person would think still that there was a real likelihood of bias on his part.

[19] Khan's insistence that Rabeah's premises should not be demolished until the plans were approved is not irrelevant. The facts showed that Khan had intimated to the appellant that he wanted a three-room flat for Rabeah and consequently the appellant's offer in 1 September 1993 to Rabeah for a two-room flat was rejected. After the rejection, Khan sat at a Sub-Committee meeting on 5 September 1993 rejecting the appellant's appeal, and again on 20 September 1993 at the Full Committe meeting which also rejected the appeal. Clearly, Khan should not have sat at these meetings as a proper inference could arise in the mind of right minded person that he was bias. The role played by him clearly breached the principles of *nemo debet esse judex in propria sua causa* (no man can be judge in his own cause) as well as *nemo sibi esse judex vel suis jus dicere debet* (no man ought to be own judge or administer justice in cases where his relations are concerned).

[20] An administrative act may be partially good and partially bad. The principle is that if the bad can be cleanly severed from the good, the Court will quash the bad part and leave only the good standing. Thus, a distinction should be made here between the said planning permission, the seven conditions to which it was originally subject, and the additional conditions imposed. A distinction should be drawn between that which is void and that which should be cured by judicial review.

[21] The respondent committed an error of law in imposing the second condition on 20 July 1993 and in failing to abrogate it on 20 July 1993. It is however severable from the said planning permission, and merely quashing it will not answer the needs of justice.

[22] Section 24(4) of the Act requires a planning permission under s. 24(3) to remain valid for 12 months *from the date of the extension thereof.* However, the date of extension is the date on which the permission was extended and not the date on which the previous permission lapsed. Therefore the respondent was wrong in making a retrospective order instead of extending the planning permission from 20 July 1993 to

19 July 1994. Pursuant to Article 8 of the Schedule to the Courts of Judicature Act 1964, however, this Court is given power to enlarge time in cases of this nature.

[23] In the circumstances this Court must do what the respondent ought to have done if it was fair. Accordingly, an order in terms is made of the first prayer of the appellant's substantive motion dated 4 March 1994. And further, the planning permission granted on 6 September 1991 ought to be extended for one year from the service on the respondent of the order extracted pursuant to this judgment, but without the the second condition, i.e. without the words "*menyediakan 30% kos rendah atas harga RM25,000 seunit*".

[Appeal allowed. Decision of Court below set aside. Order accordingly]

***[Bahasa Malaysia** Translation of Headnotes]*

***UNDANG-UNDANG PENTADBIRAN:** Kajian semula kehakiman - Tribunal bawahan - Permohonan untuk certiorari - Budibicara Mahkamah - Prinsip-prinsip yang menguasai - Samada berlakunya penyalahgunaan kuasa - Samada terdapatnya kesilapan undang-undang yang telah dilakukan - Samada terdapatnya penafian kepada pengharapan sah - Samada berlakunya kemungkiran keadilan asasi - Samada keputusan tak rasional dan terburu-buru - Dakwaan kemungkiran keadilan asasi dan berat sebelah terhadap pihak berkuasa tempatan - Samada Mahkamah berkewajipan untuk memeriksa dakwaan bagi melihat samada certiorari harus diberi.*

***UNDANG-UNDANG PENTADBIRAN:** Kajian semula kehakiman - Permohonan untuk certiorari untuk membatalkan keputusan Pihak Berkuasa Tempatan - Hak kepada certiorari - Samada akan hilang kerana kewujudan remedi alternatif - Samada bergantung kepada samada berlaku salahguna kuasa oleh Pihak Berkuasa Tempatan - Akta Perancangan Bandar dan Desa 1976, ss. 22, 23, 24(5).*

***UNDANG-UNDANG PENTADBIRAN:** Keputusan pentadbiran - Samada mungkin sebahagiannya tidak wajar - Samada boleh diasingkan - Samada perbezaan hendaklah dibuat antara yang tak sah dan yang boleh diperbaiki oleh kajian semula kehakiman - Samada Mahkamah boleh membatalkan bahagian yang tidak wajar dan biarkan bahagian yang wajar atau sempurna kekal.*

***PROSEDUR SIVIL:** Alasan penghakiman - Keputusan dicatat secara bertulis dan ditandatangani oleh Hakim - Samada merupakan satu alasan penghakiman - Hakim memberikan alasan-alasan penghakiman tambahan selepas pemfailan notis rayuan - Samada dua alasan penghakiman yang berasingan - Samada tidak diinginkan - Kaedah-kaedah Mahkamah*

Persekutuan 1995 k. 57(4)(e) - Kaedah-kaedah Mahkamah Rayuan 1994 k. 18(4)(d) & (e) - Kaedah-kaedah Mahkamah Rendah 1980 A. 49 k. 2(3) - Akta Mahkamah Kehakiman 1964 - Kaedah-kaedah Mahkamah Tinggi 1980.

PIHAK BERKUASA TEMPATAN: *Perancangan bandar dan desa - Projek perumahan - Syarat tambahan kepada kebenaran perancangan - Samada merupakan kesilapan undang-undang - Samada merupakan penyalahgunaan undang-undang - Lanjutan kebenaran perancangan - Lanjutan diberikan bagi tempoh kurang daripada satu tahun - Samada pihak berkuasa tempatan telah bertindak dengan adil - Kuasa Mahkamah untuk memanjangkan masa - Akta Perancangan Bandar & Desa, 1976 ss. 23, 24 - Akta Mahkamah Kehakiman 1964, Per. 8 kepada Jadual di situ.*

PERKATAAN & ISTILAH: *"Sepertimana yang ianya fikirkan sesuai" - Seksyen 24(5) Akta Perancangan Bandar & Desa 1976.*

Ini merupakan rayuan terhadap keputusan Mahkamah Tinggi kerana menolak kebenaran kepada perayu untuk memohon bagi mendapatkan perintah *certiorari* bagi membatalkan keputusan yang telah dibuat oleh responden, atas alasan bahawa kewujudan satu remedi domestik melalui satu rayuan, adalah memudaratkan permohonan untuk kebenaran.

Perayu, sebuah syarikat kerjasama, adalah tuanpunya sebuah tanah di Pulau Pinang. Perayu hendak memajukan tanah tersebut dan hendak membina di atasnya, antara lainnya, 183 unit rumah pangsa kos rendah untuk dijual kepada ahli-ahlinya. Dalam bulan April 1990, selepas mengemukakan permohonannya untuk kebenaran perancangan dan dokumentasi-dokumentasi lain kepada responden, perayu telah menyempurnakan satu perjanjian dengan pemaju perumahan, Rethiko Sdn. Bhd. (Rethiko). Antara lainnya, perjanjian tersebut menentukan bahawa Rethiko akan membina dan mengendalikan projek tersebut bagi balasan tertentu yang dinyatakan dan bahawa, daripada bilangan unit yang dicadangkan untuk dibina, 110 unit akan terdiri daripada rumah pangsa dua bilik sedang yang selebihnya akan terdiri daripada unit rumah pangsa tiga bilik yang akan dijual pada harga RM32,000 dan RM45,000 masing-masingnya. Adalah tidak dipertikaikan bahawa struktur harga yang dicadangkan ini dimaklumkan kepada responden.

Fakta-fakta menunjukkan bahawa untuk mengawal harga perumahan yang tinggi dalam negeri, suatu garis-panduan yang dikenali sebagai "*Guidelines for the development of Low Cost Flats*" telah diluluskan oleh Pihak Berkuasa Negeri pada 7 Disember 1978, dan sekali lagi pada 12 Mac 1983, dalam mana telah dinyatakan bahawa harga rumah kos rendah seharusnya bernilai sebanyak "*lebih kurang RM25,000*". Selain daripada ini, Pihak Berkuasa Negeri tersebut telahjuga mengeluarkan satu lagi garis panduan, melalui Buku Hijau "Pelan Struktural 1987"nya, dalam mana antara lainnya, responden telah diarah untuk memastikan bahawa bilangan minima 30% unit perumahan dalam projek-projek

perumahan dalam negeri hendaklah terdiri daripada rumah kos rendah yang bernilai "*RM25,000 perunit and less*". Syarat 30% ini, walaubagaimana pun telah tidak disebut dalam garis panduan yang diluluskan pada tahun 1978 dan 1983.

Melalui surat bertarikh 18 Jun 1991, dengan mengambilkan garis panduan yang dinyatakan di atas, responden meminta supaya perayu meminda pelan bagi projek tersebut, meminta secara berkesannya agar perayu mematuhi kehendak-kehendak perancangan bandar yang tertentu. Dilampirkan kepada permintaan tersebut adalah garis panduan bertajuk "*Guidelines for low cost flats*", dalam mana perkara 11 di situ menghendaki agar perayu memperuntukan 30% daripada projek tersebut kepada rumah-rumah kos rendah, "*to be sold at a cost not exceeding RM25,000 per unit in accordance with Government policy*".

Sepertimana yang dijangkakan, perayu agak dengan segera membantah kepada perkara 11 ini. Biarpun keadaannya demikian, pada 7 September 1991, responden telah memberitahu perayu bahawa kebenaran pelan bagi tempoh satu tahun bagi projek tersebut telah diberikan (berkuatkuasa 6 September 1991 hingga 5 September 1992), selaras dengan k. 10(1) Kaedah-kaedah Kawalan Perancangan (Am) 1990 dan s. 22(3) Akta Perancangan Bandar dan Desa 1976 (Akta). Kebenaran tersebut menyenaraikan 7 "kehendak" kesemuanya, tetapi tiada apapun disebut mengenai sekatan harga.

Perayu, sementara itu, telah memasuki satu perjanjian tambahan dengan Rethiko, melalui yang mana mereka menyemak struktur harga flat-flat yang dicadangkan itu, dan berikutan itu, unit-unit dua bilik tidur dan tiga bilik tidur itu akan setiap satunya dijual pada harga RM35,000, RM62,000 masing-masingnya. Satu petisyen telah dikemukakan kepada responden oleh ahli-ahli perayu yang terjejas, membantah kenaikkan harga tersebut, tetapi namun begitu, harga-harga baru itu telah disahkan oleh responden di satu Mesyuarat Khas yang diadakan pada bulan Januari 1992. Berikutan itu, pada 21 Februari 1992, responden telah secara rasmi meluluskan pelan tersebut, memaklumkan semua orang, melalui surat bertarikh 24 Februari 1992, bahawa ianya tidak mempunyai kuasa untuk membuat apa-apa keputusan berhubung dengan petisyen tersebut, dan seterusnya bahawa perkara tersebut merupakan perkara dalaman antara pembeli-pembeli dan pemaju. Apa yang terjadi selepas itu adalah perayu telah menjual 70 unit rumah dua bilik tidur dan 33 unit rumah tiga bilik tidur pada harga RM35,000 dan RM62,000 masing-masingnya.

Oleh kerana kebenaran pelan tersebut akan luput pada 5 September 1992, perayu memohon untuk mendapatkan satu perlanjutannya masa pada 2 September 1992. Responden telah menimbangkan permohonan tersebut pada 20 Julai 1993, iaitu lebih kurang 10 bulan kemudiannya, dan berikutan itu, pada 30 Julai 1993, memaklumkan perayu bahawa satu perlanjutan, yang berkuatkuasa pada 6 September 1992 hingga 5 September 1993, telah diberikan. Perlanjutan yang

diberikan, dengan itu, adalah bagi tempoh 47 hari daripada tarikh keputusan, dan 35 hari daripada tarikh perayu memerima pemberitahuan. Selain itu, perlanjutan tersebut telah juga dibuat tertakluk kepada beberapa syarat tambahan, satu daripadanya adalah bahawa perayu hendaklah "*complete 30% low cost at RM25,000 per unit*" (syarat kedua).

Pada 10 Ogos 1993, perayu, setelah menjual sebahagian daripada unit-unit tersebut pada harga yang jauh berlebihan dari RM25,000 berikutan dengan kelulusan responden akan pelan tersebut pada 24 Februari 1992, secara rasmi merayu terhadap syarat yang kedua. Pada 20 September 1993, menurut terma-terma yang agak mutlak dan dengan tidak memberikan sebarang alasan baginya, responden telah menolak rayuan tersebut. Dalam keadaan ini, pada 11 Oktober 1993, perayu telah memfailkan satu permohonan kepada Mahkamah Tinggi untuk mendapatkan kebenaran untuk memohon bagi mendapatkan perintah *certiorari* bagi membatalkan keputusan responden bertarikh 20 September 1993, atas alasan bahawa ianya suatu yang batal, dan bahawa keputusan tersebut bertentangan dengan keadilan asasi, *ultra vires*, tidak wajar dan *mala fides*.

Dihadapan Hakim yang bijaksana (Hakim perbicaraan), walaupun perayu berhujah bahawa kajian semula kehakiman adalah remedi yang paling berkesan dan yang paling bersesuaian, dan bahawa bidangkuasa Mahkamah tidak sama sekali terjejas dengan kewujudan alternatif rayuan domestik selaras dengan s. 23(1) Akta, Hakim perbicaraan memutuskan bahawa kegagalan perayu untuk menggunakan remedi berkanun alternatif tersebut adalah memudaratkan dan dengan itu telah menolak permohonan perayu. Hakim perbicaraan juga berpendapat bahawa menurut s. 24(5) Akta ianya tidak dapat ditunjukkan bahawa syarat kedua tersebut dikenakan tanpa bidangkuasa..

Perayu merayu kepada Mahkamah Agung, di mana isu berhubung kegagalan perayu untuk merayu, yang mana Hakim perbicaraan telah memutuskan sebagai mewajarkan penolakan permohonan untuk kebenaran, telah sekali lagi dihujahkan dengan sepenuhnya. Rayuan tersebut telah dibenarkan, dan akibatnya, pada 24 Februari 1994, Mahkamah Agung telah memerintahkan supaya keputusan yang diberikan oleh Hakim perbicaraan diketepikan, bahawa perayu diberi kebenaran untuk memohon bagi mendapatkan *certiorari* dan bahawa usul substantif permohonan tersebut hendaklah didengar oleh seorang Hakim yang lain (Hakim).

Di perbicaraan usul yang berikutnya, walaubagaimanapun, responden telah sekali lagi membangkitkan isu remedi alternatif, dan menegaskan bahawa ianya memudaratkan usul tersebut. Perayu berhujah bahawa isu tersebut telahpun *res judicata* memandangkan penghujahan di dalam dan perintah oleh Mahkamah Agung. Hakim walaubagaimanapun memutuskan bahawa Mahkamah Agung, menurut perintahnya, telah tidak memutuskan mengenai isu remedi alternatif, dan isu tersebut, dengan itu, masih terbuka untuk dihujahkan. Usul perayu, berikutan itu, telah ditolak oleh Hakim. Perayu kini merayu terhadap penolakan ini.

Fakta-fakta menunjukkan bahawa selepas pemfailan notis rayuan oleh perayu, Hakim, atas alasan-alasan yang tidak jelas, telah memberikan alasan-alasan penghakiman yang selanjutnya, tanpa menghiraukan bahawa beliau telah mencatatkan keputusan awalnya secara bertulis dan telahpun menandatanganinya. Fakta-fakta selanjutnya menunjukkan bahawa, disebabkan keperluan untuk mengusir setinggan daripada tanah tersebut, termasuk penghuni bernama Rabeah, perayu terpaksa berurusan dengan ahli Majlis responden yang bernama Ahmad Miftah Khan (Khan), yang mana merupakan bapa saudara Rabeah. Berikutnya perayu tersebut telah menawarkan secara percuma kepada Rabeah sebuah rumah pangsa dua bilik, sebagai ganti bagi merobohkan rumah Rabeah. Walaubagaimanapun, sepertimana ianya berlaku, Khan menghendakkan sebuah rumah pangsa tiga bilik tidur untuk Rabeah dan dengan itu menolak tawaran perayu untuk rumah pangsa dua bilik tidur. Ianya tidak dipertikaikan bahawa Khan telah menyertai mesyuarat Jawatankuasa Kecil responden pada 5 September 1993 yang menolak rayuan perayu, dan juga telah menghadiri mesyuarat Jawatankuasa Penuh pada 20 September 1993 yang telah juga menolak rayuan tersebut.

Dihadapan Hakim-Hakim Mahkamah Rayuan yang bijaksana, isu-isu utama yang berbangkit adalah:

(1) Samada alasan-alasan keputusan sepertimana yang diberikan oleh Hakim selepas pemfailan notis rayuan merupakan satu penghakiman.

(2) Samada memandangkan keputusan Mahkamah Agung, isu remedi alternatif yang dibangkitkan di hadapan Hakim telah pun *res judicata*.

(3) Samada hak untuk merayu dalam kes ini telah memudaratkan penggunaan kajian semula kehakiman.

(4) Samada responden mempunyai kuasa untuk mengenakan syarat bahawa 30% daripada projek tersebut seharusnya mengandungi unit-unit dengan harga minima sebanyak RM25,000.

(5) Samada responden mempunyai pengharapan sah untuk memperbaharui kebenaran pelan atas terma-terma yang sama untuk tempoh satu tahun lagi dan bukannya untuk 47 hari atau 35 hari seperti mana keadaan di sini.

(6) Samada responden bersalah atas penyalahgunaan kuasa atau kesilapan undang-undang dalam mengenakan syarat kedua itu.

(7) Samada kelakuan Miftah Khan telah menjejaskan keputusan responden dan jika sedemikian, sehingga ke had mana.

(8) Samada kelakuan perayu adalah sedemikian rupa sehinggakan relief budibicara seharusnya ditolak.

Diputuskan:

Oleh Mahadev Shankar HMR (menyampaikan penghakiman Mahkamah):

[1] Alasan-alasan yang telah diberikan oleh Hakim bagi penolakan permohonan, dan keputusannya untuk melakukan sedemikian pada 5 Ogos 1994 telah dicatatkan secara bertulis olehnya dalam nota-notanya dan ditandatangani. Ini adalah dengan itu satu penghakiman bertulis yang bukan sahaja bersifat perintah tetapi juga adalah satu perintah yang disertai dengan alasan-alasan baginya.

[2] Melainkan di bawah kaedah khilaf, seseorang Hakim menjadi *functus officio* selepas penghakiman disampaikan dan perintah disediakan. Adalah tidak elok untuk mempunyai dua penghakiman bertulis, sebagai penghakiman tambahan, yang diberikan selepas satu penghakiman bertulis disampaikan, oleh sebab ianya menjejaskan keboleh-percayaan kehakiman kerana ianya boleh disalahanggap sebagai kepandaian meninjau hal-hal yang sudah berlaku dan bukannya mewakili proses membuat keputusan yang sebenar.

[3] Penghujahan responden bahawa dalam memberikan kebenaran, Mahkamah Agung hanya bertindak atas keputusan terdahulunya sendiri, bahawa di peringkat kebenaran, seseorang Hakim tidak seharusnya secara kritis menilai merit-merit permohonan untuk kebenaran, dan dengan itu kemudaratan remedi alternatif dalam kes semasa ini terbuka untuk hujahan buat kali yang ketiga, tidak dapat dipertahankan. Adalah jelas bahawa, jika Mahkamah Agung memikirkan bahawa kemudaratan akan berlaku dengan adanya remedi alternatif, ianya tentu sekali tidak akan membenarkan rayuan tersebut. Isu remedi alternatif yang dibangkitkan oleh responden di hadapan Hakim selepas perintah Mahkamah Agung bertarikh 24 Februari 1994, adalah secara jelasnya *res judicata.*

[4] Perintah Mahkamah Agung tidak mengandungi perkataan "merits". Ianya namun begitu memerlukan pertimbangan akan kesemua isu-isu yang dibangkitkan dalam usul substantif tersebut. Sepertimana keadaannya, sesuatu permohonan berdasarkan merit adalah suatu permohonan yang bergantung pada keadilan sedia ada dalam penegasan perayu dan ianya tertuju kepada fakta-fakta substantial kes tersebut dan berbeza daripada bantahan-bantahan teknikal atau perkara kolateral.

[5] Berhadapan dengan afidavit-afidavit yang tebal, dan isu undang-undang pentadbiran yang sukar dikawal, jalan yang diambil dalam Mahkamah di bawah mengandungi tarikan kabur yang berlandaskan atas bantahan yang minima. Ini adalah dikesali, kerana setelah mengarahkan dirinya sendiri bahawa penghakiman Mahkamah Agung menghendakinya berurusan dengan "the entire merits" permohonan tersebut, Hakim telah melupuskan

rayuan tersebut bukannya atas keseluruhan merit tetapi atas apa yang secara berkesannya merupakan satu perkara teknikal yang tidak lagi terbuka untuk pertimbangan.

[6] Samada sesuatu kilanan seharusnya dilayan hanya dengan cara rayuan, atau melalui kajian semula kehakiman, tanpa menghiraukan adanya remedi domestik, haruslah bergantung kepada samada aduan berkenaan menonjolkan suatu "penyalahgunaan undang-undang". Ungkapan penyalahgunaan undang-undang haruslah digunakan seluasnya dan mestilah bersamaan dengan "suatu kesilapan undang-undang" sebagaimana ungkapan tersebut kini digunakan (contohnya seperti yang digunakan dalam *Syarikat Kenderaan Melayu Kelantan Bhd. lwn. Transport Workers Union*), dan dengan itu termasuk penafian harapan sah, suatu kemungkiran keadilan asasi atau pembuatan keputusan yang tidak rasional dan tidak adil, antara lainnya. Sehubungan ini, perkataan-perkataan "*clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice"* yang terdapat dalam ungkapan terpenting *Jagdis Singh* tidak boleh dianggap sebagai sempurna tetapi hanya sebagai satu siri misalan yang terbuka dalam mana Mahkamah akan mencampurinya.

[7] Prinsip yang terpakai di negeri ini adalah bahawa dengan adanya remedi domestik alternatif ianya tidak akan samasekali menutup permohonan untuk kajian semula kehakiman di mana aduan yang dibuat adalah sesuatu "error of law" atau "abuse of power" yang menjejaskan keesahan kelakuan tribunal bawahan atau mana-mana pihak berkuasa yang membuat keputusan, kecuali remedi domestik tersebut telah diniatkan bagi dan pada hakikatnya membentuk suatu remedi yang memadai bagi pelupusan adil akan aduan yang dipersoalkan. Situasi hari ini adalah, bahawa, jika kemungkiran keadilan asasi dan sikap berat sebelah didakwa, Mahkamah akan memeriksa dakwaan-dakwaas tersebut bagi mengetahui samada *certiorari* seharusnya diberi.

[8] Dalam apa keadaanpun, menurut fakta-fakta, tuntutan responden mengenai remedi alternatif tidak boleh dipertahankan kerana walaupun, *de jure,* statut telah memberikan remedi yang sedemikian terhadap keputusan yang telah dibuat pada 20 Julai 1993, responden secara *de facto* telah dengan cara yang memudaratkan berkompromi dengan hak itu dengan melayan surat perayu melalui rayuan untuk kajian semula bertarikh 10 Februari 1993 dan berikutan itu melengahkan jawapannya sehingga 23 September 1993 yang mana pada masa itu, tempoh masa untuk rayuan telah pun luput. Keputusan responden pada 20 September 1993 tidak dibuat di bawah s. 22(3) yang dibaca bersama s. 24(5) Akta dan dengan itu tidak boleh dirayui di bawah s. 23. Hasilnya adalah bahawa perayu tidak lagi mempunyai remedi domestik dan satu-satunya cara adalah dengan kajian semula kehakiman.

[9] Garispanduan-garispanduan seperti "*Garispanduan untuk Pembangunan Rumah Pangsa Kos Rendah*" adalah hanya kenyataan prinsip sahaja. Dengan ketiadaan apa-apa saranan bahawa ianya telah dimansuhkan, Mahkamah ini hanya boleh bertindak atas dasar bahawa garispanduan tersebut yang diluluskan pada 12 Mac 1983 masih berkuatkuasa dalam tahun 1991. Garispanduan ini jelas membenarkan tolak ansur berhubung dengan kos bagi rumah pangsa kos rendah, iaitu "lebih kurang RM25,000". Berhadapan dengan latarbelakang ini, butiran tentang "requirements of the respondent's list of 18 June 1991" tidak boleh dianggap sebagai tidak boleh dirunding.

[10] Pada 6 September 1991, responden mengetahui bahawa harga yang dicadangkan itu bagi masing-masing unit rumah pangsa tersebut adalah sebanyak RM32,000 dan RM45,000, bahawa perayu tidak bersetuju dengan kehendak-kehendak 11 dalam senarai responden bertarikh 18 June 1991 bahawa harga tersebut tidak seharusnya melebihi RM25,000 dan bahawa harga-harga ini adalah merupakan persetujuan dalaman antara ahli-ahli sebuah Koperasi dan pihak yang telah mereka pilih sebagai pemaju mereka. Dalam ertikata yang lain, harga tersebut telah dipersetujui oleh bakal pembeli-pembeli melalui wakil mereka yang telah dilantik secara sah di sisi undang-undang. Dengan kesemua pengetahuan ini, hakikatnya adalah bahawa responden tidak menjadikannya satu syarat, bilamana ianya memberikan kebenaran pelan tersebut, bahawa 30% daripada 183 rumah pangsa tersebut seharusnya dijual pada kos yang tidak lebih daripada RM25,000. Kata-kata s. 22(3) Akta menjadikannya amat jelas bahawa untuk membawa kepada satu syarat ianya mestilah digabungkan sedemikian bagi menjadikan pemberian kebenaran pelan tersebut tertakluk kepada syarat yang sedemikian, dan bahawa syarat yang sedemikian mestilah dibuat dalam borang ditentukan. Ini telah tidak dilakukan.

[11] Menganggapkan bahawa responden mempunyai kuasa untuk mengenakan syarat 30% itu, kuasa itu jelas tidak dilaksanakan pada 6 Jun 1991. Ianya juga tidak dilaksanakan selepas ahli-ahli perayu mempetisyen responden membantah kenaikan harga yang dicadangkan. Sesungguhnya melalui suratnya bertarikh 24 Februari 1992, responden mengemukakan bahawa kenaikan harga tersebut adalah merupakan perkara dalaman bagi perayu. Sepertimana keadaannya, tidak seorang pun mengadu mengenai keputusan ini.

[12] Ungkapan "penharapan sah" atau "legitimate expectation" boleh digunakan dalam pelbagai pengertian. Ianya boleh digunakan bagi menunjukkan hak substantif yang mana ditentukan bilamana terdapatnya representasi yang jelas oleh pentadbir atau badan awam dimana pihak yang pihak menuntut boleh secara wajarnya bergantung kepadanya. Digunakan dalam pengertian ini, doktrin tersebut adalah sama dengan satu estopel. Keduanya, pengharapan sah berbangkit bukan kerana pihak menuntut menuntut apa-

apa hak yang khusus kepada sesuatu faedah tetapi kerana kepentingannya di dalam hal tersebut adalah sesuatu yang dilindungi undang-undang dengan menghendakkan keadilan prosedur. Dalam pengertian ini, undang-undang memperaku bahawa kepentingan tersebut tidak boleh ditarik-balik atau dinafikan tanpa memberikan pihak menuntut peluang untuk mengulas dan tanpa pihak berkuasa terbabit menyampaikan alasan-alasan yang rasional bagi apa-apa keputusan yang bertentangan. Ketiganya, konsep pengharapan sah boleh digunakan untuk merujuk kepada prosedur adil itu sendiri. Dalam ertikata lain, ianya ditegaskan bahawa pihak menuntut mempunyai harapan sah bahawa badan awam tersebut akan bertindak secara adil terhadapnya. Kategori terakhir pengharapan sah meliputi kes-kes dimana ianya diputuskan bahawa sesuatu prosedur tertentu, yang tidak sebaliknya dikehendaki oleh undang-undang dalam melindungi sesuatu kepentingan, mestilah dituruti akibat daripada sesuatu janji atau amalan yang khusus. Keadilan menghendakkan supaya pihak berkuasa awam diikati olehnya.

[13] Mengambilkira konsep yang tersebut di atas dalam pengertian yang pertama, kebenaran pelan tersebut memberikan perayu hak substantif. Keputusan Majlis responden bertarikh 14 Februari 1992 merupakan pengemukaan yang nyata bahawa perayu tidak dikehendaki untuk menjual unit-unitnya pada harga-harga yang melebihi RM25,000. Perayu telah bergantung pada pengemukaan tersebut dan berikutan itu menetapkan harga baru dan pada hakikatnya telah menjualkannya pada harga baru tersebut. Oleh kerana responden tersebut mengetahui akan harga-harga ini dan telah menyatakan keputusan Majlis bahawa harga-harga tersebut adalah satu perkara dalaman bagi perayu, maka responden adalah tidak berhak untuk menukar keputusannya secara yang menjejaskan pihak menuntut. Dengan itu terdapat satu estopel di sini.

[14] Dengan menggunakan konsep dalam pengertian kedua, responden seharusnya memberikan notis terdahulu mengenai niatnya untuk mengenakan syarat kedua kerana kaedah-kaedah keadilan asasi menuntutnya. Ianya berkemungkinan bahawa jika peluang yang adil telah diberikan bagi membuat pengemukaan-pengemukaan, syarat kedua tersebut mungkin tidak akan dikenakan pada 20 Julai 1993.

[15] Berhubung dengan pengertian yang ketiga, ianya tidak boleh dikatakan bahawa responden telah bertindak dengan adil kerana proses membuat keputusan telah terencat dengan cara yang memudaratkan. Adalah harus diambil perhatian bahawa terdapat kehendak statutori bagi meminitkan kesemua prosiding bagi mesyuarat-mesyuarat jawatankuasa responden. Walaubagaimanapun tiada minit telah dicatitkan baginya dan berikutan itu, mengapa ianya mengambil masa hampir 11 bulan bagi responden untuk mempertimbangkan lanjutan tersebut, apakah pendapat-pendapat yang telah

dinyatakan oleh angota-angota Majlis dimesyuarat-mesyuarat ini, bagi pengenaan syarat kedua dan penolakan rayuan tersebut, telah tidak didedahkan kepada Mahkamah.

[16] Perkataan-perkataan "as it thinks fit" dalam s. 24(5) Akta tidak boleh diberikan maksud harfiahnya supaya pihak berkuasa perancangan boleh melakukan sesuka hatinya. Ianya adalah jelas bahawa, apapun syarat-syarat yang dikenakan ke atas atau perubahan-perubahan yang dibuat kepada kebenaran pelan tersebut, mestilah berkaitan dengan pembangunan yang dibenarkan. Kebenaran pelan di sini adalah hanya bagi 190 unit sahaja dan syarat-syarat baru yang dikenakan haruslah berkaitan dengan 190 unit itu.

[17] Dalam memikirkan maksud sebenar s. 24(5) yang tersebut di atas, penegasan Pengarah Perancangan responden bahawa maksud yang diniatkan bagi syarat kedua bukannya bahawa 30% daripada 190 unit tersebut seharusnya di jual pada harga di bawah RM25,000 tetapi bahawa perayu tersebut telah dibenarkan untuk membina 30% unit-unit kediaman yang seterusnya (iaitu 55 unit lagi) untuk dijual pada harga RM25,000, tidak boleh disokong. Sepertimana keadaannya, perayu tidak memohon untuk perubahan ke atas kebenaran pelan tersebut tetapi hanya untuk perlanjutan. Dengan cuba untuk memaksa perayu membina 55 unit yang lain, responden bukannya memberikan satu perlanjutan kebenaran pelan yang diberikan untuk 190 unit, tetapi memaksa perayu membangunkan satu projek yang baru bagi 238 unit di atas tanah tersebut. Dalam keadaan yang sedemikian, dalam mengenakan syarat kedua, responden telah melakukan satu kesilapan undang-undang. Selain daripada itu, cara bagaimana responden melaksanakannya membentuk satu penyalahgunaan undang-undang.

[18] Sejauhmana ianya berkaitan dengan persoalan berat sebelah, ujian di sini bukannya samada terdapatnya berat sebelah yang sebenar di pihak Khan, tetapi samada jikapun Khan bertindak seadil yang mungkin, orang-orang yang waras akan tetap berfikir bahawa terdapat kemungkinan sebenar berat sebelah di pihaknya.

[19] Desakan Khan bahawa premis Rabeah tidak seharusnya dirobohkan sehingga pelan tersebut diluluskan adalah tak relevan. Fakta-fakta menunjukkan bahawa Khan telah membayangkan kepada perayu bahawa beliau menghendakkan rumah pangsa tiga bilik tidur untuk Rabeah dan berikutan itu tawaran perayu pada 1 September 1993 kepada Rabeah bagi rumah pangsa dua bilik telah ditolak. Selepas penolakan tersebut, Khan telah menyertai mesyuarat Jawatankuasa Kecil pada 5 September 1993 yang menolak rayuan perayu, dan sekali lagi pada 20 September 1993 di mesyuarat Jawatankuasa Penuh yang mana telah juga menolak rayuan tersebut. Jelasnya, Khan tidak seharusnya menyertai mesyuarat-mesyuarat

ini kerana inferens yang betul boleh berbangkit dalam pemikiran orang-orang yang wajar bahawa beliau berat sebelah. Peranan yang dimainkan oleh beliau jelas memungkiri prinsip *nemo debnet esse judex in propria sua causa* (tiada sesiapa boleh menjadi Hakim dalam kausanya yang bersendiri) dan juga *nemo sibi esse judex vel suis jus dicere debet* (tiada sesiapa yang harus menjadi hakim bagi dirinya sendiri atau mentadbir keadilan dalam kes-kes di mana saudara-maranya adalah berkaitan).

[20] Sesuatu tindakan pentadbiran mungkin sebahagiannya sah dan sebahagiannya batal. Prinsipnya adalah jika bahagian yang batal boleh dipisahkan daripada yang sah, Mahkamah akan membatalkan bahagian yang batal dan hanya mengekalkan bahagian yang sah sahaja. Dengan itu, satu perbezaan seharusnya di buat antara kebenaran pelan tersebut, ketujuh-tujuh syarat terhadap mana ianya telah pada asalnya tertakluk, dan syarat tambahan yang dikenakan. Satu perbezaan mesti ditentukan antara perkara yang batal dan yang mana seharusnya diperbaiki oleh kajian semula kehakiman.

[21] Responden telah melakukan kesalahan undang-undang dalam mengenakan syarat kedua pada 20 Julai 1993 dan dalam kegagalan untuk membatalkannya pada 20 Julai 1993. Ianya walaubagaimanapun boleh diasingkan daripada kebenaran pelan tersebut, dan membatalkannya semata-mata tidak akan menyelesaikan keperluan keadilan.

[22] Seksyen 24(4) Akta menghendakkan kebenaran pelan di bawah s. 24(3) untuk kekal sah selama 12 bulan daripada tarikh perlanjutannya. Walaubagaimanpun, tarikh perlanjutan adalah tarikh bilamana kebenaran tersebut dilanjutkan dan bukannya tarikh bilamana kebenaran terdahulu tersebut luput. Dengan itu responden adalah salah dalam membuat satu perintah kebelakangan dan bukannya melanjutkan kebenaran perancangan tersebut daripada 20 Julai 1993 hingga 19 Julai 1994. Selaras dengan Perkara 8 Jadual kepada Akta Mahkamah Kehakiman 1964, walaubagaimanapun, Mahkamah ini diberi kuasa untuk melanjutkan tempoh masa dalam kes-kes yang bersifat sebegini.

[23] Dalam keadaan yang sedemikian, Mahkamah ini haruslah membuat apa yang responden seharusnya telah lakukan, jika ianya adil. Berikutan itu, satu perintah adalah diberi seperti yang dipohon dalam pohonan pertama dari usul substantif plaintif bertarikh 4 Mac 1994. Dan selanjutnya, kebenaran pelan yang diberikan pada 6 September 1991 seharusnya dilanjutkan selama satu tahun daripada tarikh penyampaian ke atas responden perintah yang dikeluarkan dalam penghakiman ini, tetapi tanpa syarat kedua tersebut, iaitu tanpa perkataan-perkataan "menyediakan 30% kos rendah atas harga RM25,000 seunit".

[Rayuan dibenarkan. Keputusan Mahkamah di bawah diketepikan. Perintah sepertinya]

Cases referred to:
Ankur Nath Ganguli v. PP [1956] 2 MLJ ***(refd)***
Nathan v. PP [1972] 2 MLJ 101 ***(refd)***
Loh Kwang Seong v. PP [1960] MLJ 271 ***(cit)***
Hock Hua Bank Bhd. v. Sahari bin Murid [1981] 1 MLJ 142 ***(foll)***
Yap Liang Neo v. Tan Yew Ghee & Anor. [1936] MLJ 141 ***(foll)***
R. v. Secretary of State ex parte Swati [1986] 1 All ER 717 ***(refd)***
Petaling Tin Bhd. v. Lee Kian Chan [1994] 1 MLJ 657 ***(refd)***
Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Bank Association [1990] 3 MLJ 228 ***(dist)***
Inland Review Commissioners v. National Federation of Self-Employed and Small Businesses Ltd. [1982] AC 617 ***(dist)***
Hotel Ambassador (M) Sdn. Bhd. v. Seapower (M) Sdn. Bhd. [1991] 1 MLJ 404 ***(refd)***
Florence Bailes v. Dr. Ng Jit Leong [1983] 2 MLJ 165 ***(refd)***
Cheng Hang Guan v. Perumahan Farlim (Penang) Sdn. Bhd. [1993] 3 MLJ 352 ***(refd)***
Government of Malaysia & Anor. v. Jagdis Singh [1987] 2 MLJ 185 ***(dist)***
Land Executive Committee of the Federal Territory v. Syarikat Harper Gilfillan Berhad [1981] 1 MLJ 234 ***(dist)***
The State (Abenglen Properties Ltd.) v. The Right Honourable The Lord Mayor Aldermen and Burgesses of Dublin [1982] ILRM 590 ***(dist)***
Lai Cheng Cheong v. Sowaratnam [1983] 2 MLJ 113 ***(refd)***
Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 AC 147 ***(cit)***
South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union & Ors. [1981] AC 363 ***(cit)***
Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union [1995] 2 CLJ 748; [1995] 2 AMR 1601 ***(foll)***
Cheong Seok Leng v. PP [1988] 2 MLJ 481 ***(refd)***
R. v. Devon CC ex p. Baker [1995] 1 All ER ***(foll)***
R v. London Borough of Hillingdon ex parte Roy Co. Homes Ltd. [1974] 2 All ER 643 ***(refd)***
PYX Granite Co. Ltd. v. Ministry of Housing and Local Government [1958] 1 QB 554 ***(foll)***
R. v. Amber Valley District Council ex parte Jackson [1984] 3 All ER 501 ***(foll)***
Lower Hutt City Council v. Bank [1974] 1 NZLR 545 ***(foll)***
Metropolitan Properties Co. (FGC) Ltd. v. Lannon [1968] 3 All ER 304/[1969] 1 QB 577 ***(foll)***
R v. Sevenoaks District Council ex parte Terry [1985] 3 All ER 226 ***(dist)***
R v. St. Edmundsbury Borough Council [1985] 3 All ER 234 ***(dist)***
PP v. Datuk Tan Cheng Swee and Anor. [1979] 1 MLJ 166 [1980] 1 MLJ 117/ [1980] 2 MLJ 276 ***(cit)***
Hock Hua Bank (Sabah) Bhd. v. Yong Liuk Thin & Ors. [1995] 2 MLJ 213 ***(foll)***
Badat bin Drani v. Tan Kheat [1953] MLJ 67 ***(refd)***
Hall and G Ltd. v. Shoreham-By-Sea UDG [1964] 1 All ER 1 ***(refd)***
DPP v. Hutchinson [1990] 2 All ER 836 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 94
Courts Ordinance 1948, s. 21(1)
Criminal Procedure Code, s. 302(3)

Housing Developers (Control & Licensing) Act 1966, ss. 2(2)(a), 3(1)
Housing Developers (Control & Licensing) Regulations 1989, regs. 3(6), 5, 5(5), 10
Interpretation Act 1948 and 1967, s. 61
Local Government Act 1976, ss. 10(1), 28, 34(1), (5)
Planning Control (General) Rules 1990, r. 10(1)
Rules of the High Court 1980, O. 42 rr. 1, 5, O. 53 r. 1A
Rules of the Court of Appeal 1994, r. 18(4)(d), (e)
Rules of the Federal Court 1995, r. 57(4)(e)
Subordinate Court Rules 1980, O. 49 r. 2(3)
Town and Country Planning Act 1976, ss. 1(2), 2, 3, 4(5), 5, 6, 9(2), 10(1), (6), (7), 18, 19, 20, 21, 21(6), 22, 2(a), 2(b), (3), (6), 23

Other sources referred to:
Administrative Law, Sir William Wade, 6th Edn., p. 338

For the appellant - R.R. Sethu (R. Rajasingam with him); M/s. Rajasingam & Co.
For the respondent - Cyrus Das (Karen Lim with him); M/s. Presgrave Matthews

JUDGMENT

Mahadev Shankar JCA:

Compelling arguments have been made to us by Counsel for both parties, on whether or not a decision made by the respondent could and should be subject to judicial review. The scope of these arguments, the complexity of the issues raised, and the multitude of Malaysian and Commonwealth authorities cited have all forced us to take some time to finalise this judgment. Our hope is that it will help to clear some doubts on important points of public law.

History

Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan Berhad (the appellant) is a Co-operative Society registered under the Co-operative Societies Act 1948. The appellant owned the land comprised in Lot 006099 Mk. 13 D.T.L. Sungai Gelugor, Pulau Pinang (the said land) (p. 1 of appeal record). The said land was 1.9 acres in area and had road frontage along Jalan Helen Brown. On 22 March 1987 the appellant's members decided at an annual general meeting (AGM) that low-cost flats should be built on the said land (p. 652 of the appeal record) to be sold to the appellant's members or their dependents. Mr. Lawrence Loh (the architect) was engaged to process the necessary documentation and plans, which were for a "proposed single block of 10-storey flats (each under 700 sq. feet) which included 183 units of flats and 7 units of shops" and apply for planning approval.

On 21 April 1990 the appellant entered into a joint-venture agreement (the said agreement) (p. 561 of the appeal record) with Rethiko Sendirian Berhad (Rethiko). The preamble to the said agreement states, *inter alia:*

(1) that Rethiko has a license to develop housing schemes;

(2) that the appellant had applied for planning permission to put up 190 units and would try to obtain the maximum density of 100 units per acre; and

(3) that Rethiko would pay the appellant RM900,000 if planning approval was obtained for 190 units.

The body of the agreement stipulated *inter alia* that:

(1) the appellant appointed Rethiko to develop and manage the project;

(2) the premium of RM900,000 would be paid in instalments;

(3) the appellant undertook and guaranteed to secure purchasers for all 190 units;

(4) the selling price of a two-bedroom flat measuring an average of 500 sq. feet shall not exceed **RM32,000** and a three bedroom flat measuring an average of 650 sq. feet shall not exceed **RM45,000** (Emphasis supplied);

(5) 110 units would be two-bedroom flats, 74 units would be three-bedroom flats, 5 units would be shop-houses and 12 would be shoplots outside the building;

(6) the appellant would be a party to all contracts of sale of the individual units;

(7) the appellant and Rethiko shall conform to the Housing Developers (Control & Licensing) Act 1966, and in particular regs. 5(5)(a), 10 and 11 of the Housing Developers (Control & Licensing) Regulations 1989;

(8) the developer shall not charge the said land but use its own financial resources to complete the project.

The appellant was to continue to own the said land until such time as it was required to transfer the units to its member purchasers, whereas the financial risk to provide the entire capital required to push the project through fell on Rethiko whose profit must have been the difference between the price at which the units were sold and Rethiko's total outlay. RM900,000 was the appellant's share of this projected difference. By virtue of retention of ownership of the said land the control of the project till ultimate sale remained with the appellant with negligible financial risk.

The first formal response by the respondent to the application for planning approval was a letter dated 18 June 1991 (p. 680 of the appeal record) in which the respondent's secretary required the appellant to amend its plans within two months to take into account the requirements of the Town Planning Department, and various other departments. A copy of this letter was sent to the architect.

The requirements aforesaid were listed in a separate enclosure headed *"Kehendak-Kehendak Perancangan Bandar"* (p. 681 of the appeal record). Under item 5 the respondent stated that the permitted density was 60 units per acre whereas the proposed density was 99.06. Item 6 stated that the developer should comply with the respondent's "**Guidelines for low cost flats**" (Garispanduan-garispanduan mengenai rumah pangsa murah Majlis) (the said Guidelines). Item 8 stated that a co-operative society was entitled to a density of 100 units per acre. Item 11 stated that 30% of the low-cost houses have to be built and sold at a cost not exceeding RM25,000 per unit in accordance with Government policy.

In evidence in the Court below was a photocopy of the cover sheet and three pages of a publication instituted *"Dasar-dasar/Garispanduan-garispanduan"* (p. 652 of the appeal record). The first page is a foreword by the respondent's secretary to say that these guidelines were being published for the benefit of the public to inform them of the planning and building requirements of the respondent. The second and third pages are headed "Guidelines for the development of low-cost flats" and stated to have been passed on 7 December 1978 and 12 March 1983 (p. 656 of the appeal record). There are nine items here. Item 1 provides for a density of 60 units per acre, Item 2 stipulates that the area of each unit should not exceed 700 square feet. Item 4 stated that the cost of each unit should be **about** RM25,000. The actual words used are *"Hendaklah lebih kurang RM25,000 bagi tiap-tiap satu unit"*. The respondent has nowhere in the proceedings here or in the Court below classified by what margin the cost could exceed or fall short of RM25,000. (If around RM25,000 was the right price on 12 March 1983 what should have the price in 1991? *"Lebih kurang"* obviously permitted some flexibility which should take into account price fluctuations in the economy). Item 9 states that the on an *ad hoc* basis the respondent would consider applications for increased density but the maximum permitted density shall not exceed 100 units per acre.

On 13 August 1991 the architect replied to the respondent's letter of 18 June 1991. Point by point he dealt with the respondent's guidelines. He asked for a density of 100 units per acre but as to Item 11 he stated:

> Syarat ini telah dinotakan di atas pelan. Ingin dimaklumkan bahawa syarat ini telah dinotakan di bawah bantahan. Pihak pemaju akan merayu terhadap syarat ini kemudian.
>
> (This **condition** has been noted on the plan. Please be informed that this condition has been noted under objections. The developer will appeal against this condition later).

The respondent's letter dated 18 June 1991 did not use the word "condition" *(syarat)* but requirements *(kehendak-kehendak)*. The architect should have referred to Item 11 likewise.

By a letter dated 7 September 1991 the respondent wrote to the appellant that planning permission had been granted on 6 September 1991 for the proposed project. This letter (p. 580 of the appeal record) states that the planning permission would expire on 5 September 1992. The rest of the letter relates to provisions for the sale of 30% of the units to Bumiputras. The planning permission was contained in a separate document (p. 581 of the appeal record). It was for one block of low-cost flats consisting of 183 units and 7 shops on the said land. It refers to r. 10(1) of the Planning Control (General) Rules 1990, r. 10(1) pursuant to s. 22(3) of the Town and Country Planning Act 1976 (**the Act**) and purports to be in Form C(1) (**the said planning permission**). It stated in so many words, "The grant of planning permission is subject to the following conditions," and spelt out seven conditions.

Section 22(6) of the Act reads:

> (6) If planning permission is granted, whether with or without conditions, it shall be conveyed to the applicant in the prescribed form and at the same time a notice of the grant thereof shall be given to any person who has made any objection pursuant to s. 21(6).

Apart from a condition that the authorised maximum density shall not exceed 100 units per acre the 6 other conditions stipulated made no reference whatsoever to its being a condition that the cost of the units should not exceed RM25,000 per unit. It should be reiterated here that in Item 11 of the respondent's list of requirements dated 18 June 1991 the respondent required the price to be not exceeding RM25,000, and on 13 August 1991 the appellant had objected to this. If the respondent regarded the cost of RM25,000 as being an inflexible condition it could have stipulated so on 6 September 1991. Condition (vii) stated that the grant of planning permission shall not restrain and preclude the respondent from imposing any requirement or condition before the building plan is approved. In his submission to us Mr. Das conceded that the respondent was aware of the contents of the said agreement when the said planning permission was granted on 6 September 1991. The point is that the respondent knew then that the proposed prices was RM32,000 for a two-bedroom unit and RM45,000 for a three-bedroom unit.

On 14 December 1991 the appellant and Rethiko had entered into a supplemental agreement (p. 574 of the appeal record) (**the supplemental agreement**). It referred to the extra RM117,300 payable to the respondent in lieu of the open space and the additional "*gerais*" (external shops) approved on the lay-out plan and the rise in the cost of raw materials and labour since the said agreement was executed and provided that the selling price of the two-bedroom units should be increased to RM38,000 and the three-bedroom units to RM62,000 (**the new prices**). The new prices had been circularised to all the appellant's members.

Some of the appellant's members objected to these prices. By a letter dated 12 December 1991 (p. 606 of the appeal record) 151 of them sent a joint petition (**the said petition**) to the respondent's president, the director of buildings, council members and to the director of co-operatives. The said petition complained *inter alia* that the appellant was going to build flats on the said land at a cost exceeding RM25,000, that the members could not afford to buy medium-cost houses, and so on. The prayer was that a condition should be imposed that 75% of the units to be built on the said land should be sold at a cost not exceeding RM25,000 and if such a condition was not imposed this project should be scrapped. Despite this petition the new prices were ratified at a special board meeting of the appellant on 30 January 1992.

The said petition made it patently obvious to every person in authority in the respondent's institution that the appellant was going to sell the proposed units at a price well in excess of RM25,000. In accordance with condition (vii) of the said planning permission, the respondent could at this stage have imposed a condition that the cost of 30% of the units should not exceed RM25,000 each. It did not do so. The sequence of events immediately thereafter was that the plan was formally approved on 21 February 1992, and on 24 February 1992 the respondent's director of buildings sent a formal letter (p. 766 of the appeal record) to the architect with a copy to the appellant to state that he had been directed to refer to this petition and to inform the architect and the appellant that the respondent's Council had at its meeting of 13 February 1992 decided that the respondent had no authority to make any decision with regard to this petition and accordingly referred the matter back to the appellant co-operative to decide the matter.

The respondent's letter of 24 February 1992 literally left the question of pricing to be settled internally as a domestic problem between the appellant and its members. In the event the appellant and Rethiko sold 70 out of the 110 units at RM35,000 and 33 out of the 83 three-bedroom units at RM62,000.

Although Rethiko had obtained its license to proceed with this development under reg. 3(6) of the Housing Developers Regulations 1989 from the Controller of Housing on 20 December 1991 they were unable to do so because the land was subject to a private caveat and there were squatters on the land (p. 351/9 of the appeal record). One of the requirements of the respondent was that all existing structures on the land should be demolished before any building work could being [583A - reference letter August 1991 - P.B. 30476(LB)].

One of the squatters on the said land was Robitah binti Aboo Bakar @ Rabeah binti Abu Bakar (**Rabeah**). The house she occupied was no. 403 Sungai Gelugor. One of the members of the respondent's council was one Ahmad Miftah Khan (**Khan**). The appellant's secretary gave affidavit evidence in the Court below, at first instance, that after the appellant's chairman offered

Rabeah two alternatives she came back to the appellant's office and told the appellant's secretary that Khan was her uncle and that Khan had told her not to settle without him and that all negotiations should be done by him. As will appear hereafter Khan had sat in the Planning Committee Meeting which granted the permission on 6 September 1991 and also in its meetings on 20 July 1993, 6 September 1993 and 20 September 1993, when the appellant's request for an extension was considered and only approved with the further condition which the appellant wants quashed.

By early September 1992 Rethiko was not able to start building works. The planning permission granted in 1991 was due to expire on 5 September 1992. So on 2 September 1992 the architect applied in writing for a first extension and supported it with the required documentation.

This application for extension was only considered by respondent at its meeting on 20 July 1993. Why it took over 10 months for the respondent to deal with this application is not explained. At no time prior to 20 July 1993 did the respondent give the appellant any notice that additional conditions were being considered. The decision reached was conveyed to the appellant by a letter dated 30 July 1993.

The first paragraph of the letter stated that the respondent had agreed to grant the first extension subject to the following additional conditions:

(1) the requirements of the J.K.R. dated 5 November 1992 must be complied with;

(2) the completion of 30% low-cost at RM25,000 per unit ("the second condition") (*"menyediakan 30% kos rendah atas harga RM25,000 seunit"*);

(3) the sale of the units are limited to the members of the appellant only.

The second paragraph stated the extension was from 6 September 1992 to 5 September 1993. Thus it was not for a year but was in effect for 47 days from the date of decision. Since this decision was only communicated by letter dated 30 July 1993 and received on 31 July 1993 it was effectively an approval for 35 days. Another curious feature of this letter is that the technical requirements of the approved plan were still being processed on 5 November 1992, although the first planning permission lapsed on 5 September 1992.

In the third paragraph the respondent's planning director said he was again drawing the attention of the appellant to s. 20 of the Act which stated:

> No person shall commence, undertake or carry out any development otherwise than in conformity with the planning permission granted to him under s. 22 in respect of the development or with the conditions of the planning permission.

The letter further stated that thus if the appellant was minded to apply for an extension of the period of the planning permission, the application for such extension had to be made together with the fees payable before the period or the extension of planning permission expired and that no further reminder would be sent in this connection.

By a formal letter dated 10 August 1993 the appellant appealed to the respondent to reconsider its second condition. The letter was addressed to the respondent's secretary. It ran into 3 pages. Copies were extended to the architect, the director of buildings, and Rethiko. The contents of this letter have to be set out in some detail. In the opening paragraph the appellant's secretary stated that the koperasi was appealing to the respondent to reconsider the second condition on the following grounds:

1(a) the request was for extension of permission and not for a new project;

(b) the condition imposed was of retrospective effect and therefore unfair.

2(a) the proposed building was for a co-operative and not a profit making institution. The respondent had done much to promote the co-operative movement in providing houses for its members. The second condition was inconsistent with the respondent's spirit of assisting co-operative building programmes;

(b) "Elaboration of 2(a)",

(c) the units were for sale to members and their family only and the issue of sale to outsiders did not arise.

3. the cost of the units were fair i.e., RM35,000 for a two bedroom unit and RM60,000 for a three-bedroom unit and from all aspects this was a low-cost building;

4. the buyers of these units from amongst the appellant's members had already made heavy financial contributions towards the cost of purchase;

5. there was no such condition in the original planning permission and in the absence of such a restriction:

(i) the koperasi had sold 70 out of the 110 two-bedroom units at RM35,000. The remaining 80 units were priced at RM60,000;

(ii) the design and the cost could not now be amended to provide 30% low-cost (units) in the same building and to reduce the cost of the remaining unsold units would cause the koperasi financial loss;

(iii) the koperasi had already signed agreements with Rethiko which had obtained a developer's license and compliance with the new condition would cause the appellant to breach the said agreements and expose it to claims for damages.

On 60 of the two-bedroom units sold 10% totalling RM347,909.21 had been collected. Copy bank statement was enclosed.

Although the extension granted was due to expire on 5 September 1993, the appeal was only considered on 20 September 1993. The respondent's decision was that the appeal be rejected. The decision was communicated by a letter dated 23 September 1993. It brusquely stated that the appeal was rejected and the two additional conditions i.e., 30% at RM25,000 and sale to members only were reaffirmed.

Whilst the appellant's request for an extension was pending, the appellant acted on Rabeah's assertion that she would only negotiate the terms of her vacating her premises through her Uncle Khan. The appellant's secretary gave affidavit evidence that on 3 May 1992 he wrote a letter to Khan to assist in the negotiations. The same letter was sent to Rabeah on 12 May 1993. Rabeah replied on 13 June 1993 that she would only meet the appellant's secretary if Khan was present. The secretary agreed. On 15 June 1993 the appellant held a committee meeting which Rabeah attended with Khan as her spokesman.

The appellant's secretary's version of this meeting is that Khan disclosed that he was a Municipal Councillor who could jam the project if he wanted to and insisted that Rabeah should be given one two-bedroom flat free. (The appellant's earlier offer of a 20% discount on RM35,000 was rejected). The appellant's minutes of this meeting (p. 591 of the appeal record) show there was lengthy discussion before terms were agreed which were formally confirmed at the appellant's board meeting on 25 August 1993. On 1 September 1993 the appellant's secretary sent Rabeah a formal agreement already executed by the appellant (p. 598 of the appeal record). Rabeah did not sign. According to the appellant's secretary Rabeah told him that Khan had told her not to sign until "the building plan was renewed" and also that Khan was recommending additional conditions on the approved plan.

Khan denies he received the appellant's letters but admits that he attended the appellant's committee meeting on 15 June. He further admits that he disclosed to the appellant's committee members that he was a member of the Municipal Council but claims that he did so only to clarify that he was there not as a Municipal Councillor but as an uncle of Rabeah. He vehemently denies that he abused his status as a Councillor. He admits also he asked for Rabeah to be given a free unit because that was just but denies that any agreement was reached on 15 June. He claims the appellant's minutes were fabricated as an afterthought to support its case. He further claims that a week after this meeting there was another meeting between him and Rethiko's representative in which it was agreed that Rabeah would be given a three-bedroom flat. This offer Khan says he accepted but he made it clear that Rabeah's house should only be destroyed after the respondent had approved the building plans. He claims that he never spoke to Rabeah about the renewal

of the plan or any additional conditions. He admits he participated in the meetings on 20 July 1993, 6 September 1993 and 20 September 1993 but asserts that he in no way influenced the committee to impose the second condition, which he says was imposed to implement Government policy. He claims that no member of the Council knew of Rabeah's problems and that the provision of a free unit for Rabeah had no connection with the second condition and that he never influenced the other Councillors (pp. 373-379 of the appeal record).

Now s. 23 of the Act provides than an appeal against the decision of the local planning authority made under s. 22(3) may be made to an Appeal Board within one month of the communication of such decision. The respondent could have refused to accept the appellant's appeal for reconsideration but instead it accepted the request and considered it at planning sub-committee level on 5 September 1993 before the main committee on 20 September 1993 and rejected it.

On 11 October 1993 the appellant filed an *ex parte* application for leave to apply for *certiorari*. Y.A. Abdul Hamid directed it be heard *inter partes* on 11 November 1993 and dismissed it on 16 December 1993.

The grounds on which the relief was sought before Y.A. Abdul Hamid briefly were that the decision made on 20 September was a nullity because it was against natural justice, *ultra vires,* unreasonable, irrational and *mala fides;* and in making the application, the appellant contended that the Court's jurisdiction was unaffected by the existence of any alternation statutory remedy because in the public interest judicial review was the most convenient and effective remedy.

The aforesaid factual history was there in the affidavits filed on behalf of the respective parties. The respondent claimed that the Act, the connected subsidiary legislation and Government Policy directives gave it full power to do what it did. Three further affidavits filed by the appellant, without leave of the Court, after the conclusion of the hearing on 11 November 1993, were disregarded. Respondent's Counsel took only two points (p. 771 of the appeal record). Firstly he submitted that the substantial decision sought to be quashed was made on 20 July 1992 and therefore the appellant was out of time as more than 6 weeks had elapsed (O. 53 r. 1A). Secondly it was contended that as s. 23 of the Act provided an alternative remedy by way of an appeal and the failure to appeal was fatal. He cited *Jagdis Singh* [1987] 2 MLJ 185.

The only ground on which YA Abdul Hamid rejected the application was that the appellant had not availed itself of its remedy under s. 23(1) of the Act, that is to say that its failure to appeal was fatal to the application. Indeed the Judge was at pains to say (p. 781 of the appeal record) that even though the decision in *Jagdis Singh* concerned the disposal of the substantive motion,

the position was the same at the application for leave stage because the availability of the remedy of appeal could not be disputed. He then went on to hold that by virtue of the words of s. 24(5) of the Act it could not be shown that there was a clear lack of jurisdiction when the second condition was imposed. He said that the issue of failure to perform a statutory duty did not arise and declined to go into the accusation against Khan except to say that he failed to see the connection with the conditions imposed in accordance with the policy of the State Government. In the concluding paragraph of the judgment the Judge again reiterated the failure to appeal as being critical to the dismissal of the application for leave.

This issue was raised in the memorandum of appeal and fully argued in the Supreme Court, which ordered on 28 February 1994 that the decision given by Y.A. Abdul Hamid be set aside, that the appellant be granted leave to apply for *certiorari* and that the substantive motion be heard by another Judge (**the Judge**)

Accordingly the appellant filed the substantive motion on 4 March 1994. The Judge ordered written submissions which were filed. By 18 July 1994 when the parties appeared before the Judge, there were eight affidavits filed on behalf of the appellant. Nine affidavits had been filed for the respondent. The respondent once again raised the issue of alternative remedy being fatal to the motion.

The appellant's first submission to the Judge was that this issue was *res judicata* and no longer open to the respondent to ventilate. On 18 and 19 July 1994 the Judge directed the parties to submit further on this one issue. He then reserved judgement to 5 August 1994.

In the interim the respondent filed two more affidavits and the appellant filed one. Both parties filed additional submissions.

On 5 August 1994 the Judge gave his reasons and dismissed the application. The record reads as follows:

> **Mahkamah:** After having heard Counsels of both parties earlier and having read the order of the Supreme Court, I am of the view that the decision of the Supreme Court on 26 February 1994 was merely to give leave to the application for *certiorari* by the applicant and to have the case heard before another Judge on the entire merits of the application. From that said order of the Supreme Court attached I am convinced that it did not decide on the issue of domestic remedy that was raised by the respondent.
>
> **Mahkamah:** Application by the applicant is dismissed with costs.

It would thus appear that the Judge's one and only ground for dismissing the application was the existence of the alternative remedy.

A notice of appeal to us was filed on 12 August 1994. On 7 October 1994 the learned Judge supplied further grounds of judgment. It is a fair inference that well before that date the Order (p. 16 of the appeal record) had already been extracted.

First Issue

Did the Grounds of Decision Supplied by the Judge After the Filing of the Notice of Appeal Constitute a Judgment?

Mr. Sethu says that these further written grounds provide reasons other than the failure to exhaust the domestic remedy to justify the rejection of the application. He submits that a Judge who has given a judgment with grounds is *functus officio* and cannot subsequently go **outside** those grounds. He cited two cases: *Ankur Nath Ganguli v. PP* [1956] 2 MLJ and *Nathan v. PP* [1972] 2 MLJ 101. The first case turned on the proper interpretation of s. 21(1) of the Courts Ordinance 1948 which only permits the supply of grounds of decision after a notice of appeal has been filed if the Judge has not already written his judgement earlier i.e., given recorded reasons when convicting the accused. The second decision turned on s. 302(3) of the Criminal Procedure Code which requires the Court appealed from to make a signed copy of the grounds of decision when a notice of appeal has been lodged. In that case the appellant contended that there were three sets of decisions (1) the oral grounds given at the time of conviction when offending words were used; (2) the signed grounds after the notice was filed; and (3) corrections and deletions subsequently made. H.S. Ong FJ held that the only judgment for the consideration of the Court is the second or signed grounds. He further held following *Loh Kwang Seong v. PP* [1960] MLJ 271 that it was not competent for the Court to supplement the signed grounds or make deletions therefrom.

No authority directly on point in a civil case has been cited to us, and the complaint is too serious not to merit some analysis.

Subject to correction the supply of **grounds** or **reasons** for judgment has not been specifically spelt out in the Courts of Judicature Act 1964 or for that matter in the Rules of the High Court 1980. In the Judicature Act s. 94 requires the delivery of judgments of the Federal Court in open Court. Order 42 r. 1 of the Rules of the High Court 1980 has made the same requirement. In ordinary and even legal parlance a "judgment" is taken to mean both the intellectual process of arriving at a decision for the resolution of the dispute as well as the decision itself. Order 42 r. 5 states that if in the case of any judgment form thereof is prescribed in Form 79, the judgment must be in that form. If by a judgment we mean the written statement containing the facts found, the inferences made and the law applied in coming to a verdict, then "judgment or order" clearly do not mean the same thing. The term "grounds of decision" comes into play only when notice of appeal has been filed (see

O. 49 r. 2(3) of the Subordinate Court Rules 1980, r. 18(4)(e) of the Rules of the Court of Appeal 1994 and r. 57(4)(e) of the Rules of the Federal Court 1995). These rules are not similarly worded but so far as the High Court is concerned it is clear that a "written judgment" when juxtaposed with "grounds of decision" does not mean the same thing as the "judgment, decree or order appealed from" which has to be separately attached under r. 18(4)(d).

We are unable to say from the record whether there was a separate application by the appellant for the grounds of decision, or whether these were gratuitously supplied by the Judge when the notes of evidence were applied for. However the reasons given by him for the dismissal of the application, and his decision to do so on 5 August 1994 are recorded in writing by him in his notes (pp. 24, 25 of the appeal record) and signed.

Albeit with some regret we must find that this was therefore a written judgment not merely in the sense of an "order" but also in the sense of an order coupled with the grounds therefor. In *Hock Hua Bank Bhd. v. Sahari bin Murid* [1981] 1 MLJ 142 the Federal Court followed a long line of cases which held that a Judge became *functus officio* after judgment is delivered and the order drawn up except under the slip rule. In *Yap Liang Neo v. Tan Yew Ghee & Anor*. [1936] MLJ 141 I (1936) MLJ (Rep) 113 where two conflicting judgments were given in the same matter, the second was held to be a nullity.

Clearing the backlog of cases however has become the top priority, with the result that Judges nowadays tend to give short oral reasons for their decisions at the end of the trial. Courts should tell litigants where they have gone wrong. Longer written reasons are only supplied when the filing of a notice of appeal makes them absolutely necessary to achieve optimum time utilization. But supplementary grounds after a written judgment has been delivered may well affect judicial credibility because they could easily be mistaken for the wisdom of hindsight rather than representing the actual decision making process. Consequently we agree it is undesirable to have two written judgments in the same case. However this finding should not cause any injustice to the parties, since this appeal is by way of rehearing and we must tackle afresh all the issues raised in the Court below, including those the Judge did not deal with.

Second Issue

Did the Decision of the Supreme Court Preclude the Judge From Entertaining the Issue That the Availability of the Alternative Remedy of Appeal was Fatal to the Substantive Application and Compel Him to Consider the Other Issues Raised by the Appellant?

Unfortunately the Supreme Court in this case did not give its reasons for reversing Y.A. Abdul Hamid and the respondent was thereby permitted to reopen the issue.

As will be remembered Y.A. Abdul Hamid held that it did not matter that in *Jagdis Singh* this issue was decided in the substantive stage. To him the same considerations applied at the application for leave stage. It is not possible to say whether this issue was ventilated at all in *Jagdis Singh's* case at the application for leave stage (see [1981] 2 MLJ 186 at B-C) whereas in the case now before us it is clear that this issue was fully argued at the first application for leave stage and decided against the appellant not just as a ground for refusing leave but for refusing any relief altogether. The issue was also fully argued before the Supreme Court.

We agree with Y.A. Abdul Hamid that the correct approach is to decide once and for all at the leave stage whether the availability of the domestic remedy excluded judicial review. As Sir Donaldson MR said in *R. v. Secretary of State ex parte Swati* [1986] 1 All ER 717 at pp. 723 and 724:

> However, the matter does not stop there, because it is well established that, **in giving or refusing leave to apply for judicial review,** account must be taken of alternative remedies available to the applicant. This aspect was considered by this Court very recently in *R v. Chief Constable of the Merseyside Police, ex p Calveley* [1986] 1 All ER 257, [1986] 2 WLR 144 and it was held that the jurisdiction would not be exercised where there was an alternative remedy by way of appeal, save in exceptional circumstances. By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided. (Emphasis added).

In other words if the appellant can distinguish his case from the type of case for which the appeal procedure was provided, leave must be given and the Court must then proceed to consider all the substantial grounds advanced in the substantive motion.

The appellant submitted to the Judge that when the Supreme Court reversed Y.A. Abdul Hamid, and gave leave that they had cleared the first hurdle. The issue now was no longer whether the appellants were **eligible** to apply for *certiorari* but whether the material advanced justified the granting of it. They referred to *Petaling Tin Bhd. v. Lee Kian Chan* [1994] 1 MLJ 657, at 667. At p. 607 Y.A. Edgar Jospeh Jr. said:

> At this point, we would pause to observe that although the Supreme Court in allowing that appeal did not give a written judgment, it is clear beyond a peradventure that by its decision in allowing the appeal and directing that the application by way of originating summons be remitted to the High Court to be reheard on the merits before another Judge, the Supreme Court had made a finding that the Panel's purported decision - which was nothing less than an opinion on the legal consequences of a public censure - was made outside its jurisdiction and was therefore not caught by s. 179(8) of the Act which only ousts the Court's jurisdiction in respect of the Panel's decision made within its jurisdiction.

After going into the nature of ouster clauses and relevant parts of the second High Court judgment, Y.A. Edgar Joseph Jr. continued at p. 669:

> But, with all due respect to the Judge, he ought not, and indeed could not, have reopened the issue of the Panel's jurisdiction to render a purported decision on the legal effect of the imposition of a public censure under s. 179(7A) of the Act, regard being had to the clear implication of the decision of the Supreme Court in the earlier appeal, to which we have referred. In other words, the point about ouster of jurisdiction of the High Court was no longer an issue before the High Court and so the Judge ought not to have considered and made a decision on that issue.
>
> Since no written judgment was delivered by the Supreme Court in that appeal, we would, for the avoidance of doubt, say that it is patently obvious that the purported decision of the Panel amounted purely to rendering an opinion on the interpretation of s. 179(7A) of the Act itself since it was in substance an opinion as to the legal effect of the imposition of the public decision under the provisions of s. 179(7A) of the Act and not a ruling or a decision in the exercise of its jurisdiction under rr. 34.1 or 34.7 of the Code.

The material words in the order of the Supreme Court in our case, after it granted leave were **"DAN ADALAH DIPERINTAHKAN SELANJUTNYA bahawa usul substantif didengar di hadapan Hakim yang lain ..."**. The plain meaning of these words were that **the substantive motion** be heard before another Judge. Instead of equating this expression to mean what it says the respondent succeeded in convincing the Judge that in going into the "merits" he only need once again to focus his attention not on the legality of the respondent's decision but on whether the appellants were entitled to ventilate that issue at all.

Mr. Cyrus Das relied on *Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Bank Association* [1990] 3 MLJ 228 at p. 229 where Ajaib Singh SCJ said:

> The guiding principle ought to be that the applicants must show *prima facie* that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application. On the evidence in this case we found that the appellants had *prima facie* an arguable case for the granting of the relief they were seeking. Their application was not frivolous or vexatious. There were grounds to consider the allegations made by the appellants and which could only be properly heard and determined on the substantive application for an order of *certiorari* after leave has been granted.

The judgment suggests that in the High Court the application was *ex parte*. The matter did not involve the existence of an alternative remedy of appeal. Mr. Das also referred to *Inland Review Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617 where Lord Diplock said at pp. 643 and 644:

> The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the Court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the Court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the Court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.

This case also did not concern the availability of an alternative remedy. Mr. Das also submitted that the Supreme Court decision did not amount to an estoppel by record or *res judicata* and referred to *Hotel Ambassador (M) Sdn. Bhd. v. Seapower (M) Sdn. Bhd.* [1991] 1 MLJ 404, *Florence Bailes v. Dr. Ng Jit Leong* [1983] 2 MLJ 165 and *Cheng Hang Guan v. Perumahan Farlim (Penang) Sdn. Bhd.* [1993] 3 MLJ 352. What Mr. Das's submission amounted to was that in granting leave the Supreme Court had merely acted on its own previous decisions which was that at the leave stage a Judge should not critically evaluate the merits of the application for leave and therefore the fatality of the alternative remedy was available to be ventilated the third time.

With respect to Mr. Cyrus Das we were not persuaded. Quite simply if the Supreme Court thought that the availability of the alternative remedy was fatal it would not have allowed the appeal.

The order of the Supreme Court did not contain the word "**merits**". It required consideration of all the issues raised in the substantive motion. An application on the merits is one which depends on the inherent justice of the appellant's contention. It turns on the substantial facts of the case as distinguished from technical objections or collateral matter.

Faced with voluminous affidavits, and intractable issues of administrative law, the route taken in the Court below had the doubtful attraction of the line of least resistance. This was regrettable because having directed himself that the judgment of the Supreme Court required him to deal "the **entire merits** of the application" the learned Judge disposed of the appeal not on the entire merits but on what was in effect a technicality which was no longer open for consideration.

Third Issue

Was the Right to Appeal in this Case Fatal to the Application of Judicial Review?

This is an issue of great public importance, and we feel obliged to expound why we think judicial review was the correct route in this case.

In *Government of Malaysia & Anor. v. Jagdis Singh* [1987] 2 MLJ 185, there are two passages both at p. 189 which read as follows:

> Judicial review is always at the discretion of the Court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional cases.
>
> and
>
> ... the discretion is still with the Courts but where there is an appeal provision available to the applicant, *certiorari* should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice.

These passages need to be re-examined in the light of the present state of the law. Judicial experience in the past three decades has increasingly brought about a realisation that the manner in which a discretion should be exercised cannot easily be pigeonholed into judicial precedent. The factual circumstances giving entitlement to relief are too varied to permit standardisation. Just as much as what constitutes "special circumstances" for granting a stay of execution has defied analysis, so also the prescription "judicial review will only be exercised in very exceptional cases" has been proven to be a high sounding formula which is incapable of precise application. Unless the general rule can be stated with certainty, it is not easy to determine when something becomes "exceptional" or "very exceptional".

Whether a grievance should be redressed only by way of appeal, or by way of judicial review regardless of a domestic remedy being available, must turn on whether the complaint is one of "abuse of power". We use this term in its widest sense and equate it to "an error of law" as that term is used today to include *inter alia* a denial of a legitimate expectation, a breach of natural justice or a making of a decision which is irrational and unjust. Such a situation would be "exceptional or very exceptional" because the objective of the decision making process is to make lawful decisions within the ambit of the statutory powers conferred.

The words "clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice" which occur in the core passage of *Jagdis Singh* cannot today be treated as exhaustive but only as a series of open ended instances in which the Court will intervene.

The distinction we are making comes out quite clearly from some of the decided cases where judicial review was refused. Thus in *Land Executive Committee of the Federal Territory v. Syarikat Harper Gilfillan Berhad* [1981] 1 MLJ 234 the relief sought was a declaration. There was no allegation of abuse of power. In *Jagdis Singh* [1987] 2 MLJ 185. Mr. Jagdis Singh's accountant had already filed an appeal on 25 October 1985 against the additional

assessments. Whilst this appeal was pending on 14 November 1985 Jagdis Singh filed a motion for *certiorari* to quash these additional assessments because they were allegedly based on conjecture, and issued maliciously and as a vindictive act. From p. 191G of the judgment it is clear that the Supreme Court critically analysed all the evidence led to support these allegations and found them to be made without foundation. In other words the Court found as a fact that there was no abuse of power. So also in the English and Commonwealth cases cited to us and also the Irish case of *The State (Abenglen Properties Ltd.) v. The Right Honourable The Lord Mayor Aldermen and Burgesses of Dublin* [1982] ILRM 590.

Mr. Das submitted that *Lai Cheng Cheong v. Sowaratnam* [1983] 2 MLJ 113 was wrongly decided, and requested us not to regard ourselves as bound by it. He singled out a passage from the judgment of Wan Sulaiman FJ which he said went too far. It reads:

> It would seem to us that somewhat different considerations govern the exercise of the Court's discretion in deciding whether *certiorari* would apply from those which govern the exercise of its discretion in making a declaratory judgment. For instance the right to *certiorari* or prohibition may be lost by acquiescence or implied waiver, or unreasonable delay in seeking the relief. See *S.A. de Smith's Judicial Review of Administrative Action* - 4th Edn., p. 423.
>
> The existence of alternative remedies have negligible effect on restricting the powers of the Courts to provide relief. At p. 425 of the same edition appears the following passage, under the heading "*Effect of Alternative Remedies*":
>
> > The existence of a right of appeal to the Courts from a tribunal's decision does not deprive the Courts of power to award probition to restrain the tribunal from acting outside its jurisdiction. Nor is the applicant obliged to have exhausted prescribed administrative means of redress before having recourse to the Courts.
>
> An applicant for *certiorari* is not normally obliged to have exhausted his rights of appeal within the administrative hierarchy - see *R. v. Postmaster General, ex parte Carmichael*.

With respect to Mr.Das we think the passage accurately reflected the law as it was understood in 1983 in the context of that case. The situation today is that if breach of natural justice and bias are alleged the Court will examine those allegations to see if *certiorari* should issue.

It is not necessary for us to embark here on a detailed analysis of *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147 and *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union & Ors.* [1981] AC 363. Y.A. Gopal Sri Ram has admirably covered the ground in *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 AMR 1601 (also [1995] 2 MLJ 317) and we would respectfully adopt it. The relevant passages are at [1995] 2 MLJ 336 to 342 (2 AMR 1620 - 1628). The conclusion is in these words:

> In my judgment, the true principle may be stated as follows. An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision-maker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded where resort is had to an unfair procedure (see *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
>
> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant consideration (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates or principle of the general law.
>
> Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunized from judicial review by an ouster clause however widely drafted.
>
> If follows, from what I have said, that the decision of the board in *Fire Bricks* and all those cases approved by it are no longer good law. By the same token, *Kannan* [1974] 1 MLJ and *Lian Yit Engineering Works* [1974] 2 MLJ 41, though disapproved of or overruled by the board, must now be taken to have always correctly stated the law.

There is no ouster of jurisdiction provision in the Town and Country Planning Act. So this case stands on firmer grounds. The principle in Malaysia may therefore be articulated thus:

> *The availability of an alternative domestic remedy will not shut out an application for judicial review where the complaint made to the Court is one of "error of law" or "abuse of power" going to the legality of the conduct of the inferior tribunal or other decision-making authority, unless the alternative domestic remedy was intended for and in fact constitutes a wholly adequate machinery for the just disposal of the complaint in question.*

One final riposte may be made to counter the respondent's claim that there was an alternative remedy by way of appeal. *De jure* the statute did confer such a remedy against the decision made on 20 July 1973. But *de facto* the respondent fatally compromised that right by entertaining the appellant's letter by way of appeal for review dated 10 August 1993 and subsequently delaying its response until 23 September 1993 by which time the time period for appealing had lapsed. The respondent's decision on 20 September 1993 was not made under s. 22(3) read with s. 24(5) of the Act and was therefore not an appealable matter under s. 23!! By this quirk of events the appellant had no domestic remedy left and judicial review was the only way to go.

Fourth Issue

Did the Respondent Have the Power to Impose Condition That 30% of the Project Should Consist of Units Pegged to a Minimum of RM25,000?

We will now examine the respondent's submission that the reason why the second condition was imposed on 20 July 1993 was that the respondent was under a statutory compulsion to do so by Government Planning Policy as articulated in the structure plan. Mr. Das said that because this was a project for low-cost flats the appellant knew that it was obliged to comply with the second condition at all material times even before the said planning permission was given, and that it became necessary to stipulate this as a condition when the appellant applied for the extension because (to use Mr. Das's own words) the appellant "by its supplementary agreement with Rethiko had hijacked this project from a low-cost project to something else" outside the ambit of the said planning permission.

Penang Gazette PU 30 of 1984 dated 8 November 1984 notified the public that on 27 October 1984 the State Authority with the concurrence of the Minister of Housing and Local Government had appointed **1 January 1985** as the date on which the Act had come into force for the whole state of Penang. This Gazette purports to have been made by virtue of s. 1(2) of the Act.

Section 4 of the Act constituted a State Planning Committee which consists of the Chief Minister as Chairman, a Deputy Chairman being a member of the State Executive Council appointed by the State Authority and several other dignitaries including the State Director of Town and Country Planning who is the Secretary of the Committee. The "State Authority" is not defined in the Act but it is accepted that this expression has the meaning attributed to it by the Local Government Act 1976 i.e., the Governor in Council.

Section 5 of the Act designated the local authority as the local planning authority and by virtue of s. 2 the respondent was the local planning authority in this case.

By s. 3 of the Act the State Authority was empowered from time to time to give to the Committee or the local planning authority directions of a general character not inconsistent with the provisions of this Act and the Committee or the local planning authority was obliged to give effect to such directions. By s. 4(5) the Committee was empowered to give the respondent directions not inconsistent with the Act which the respondent was obliged to carry out.

By s. 2 of the Act a "development plan" meant "the structure plan" for the area and "structure plan" meant the structure plan having effect in the area by virtue of s. 10(6); and a "draft structure plan" was required to be construed as the context required.

By s. 18 of the Act no person was allowed to use land otherwise then in conformity with the local plan. By s. 19 no person could commence or carry out any development unless planning permission had been granted under s. 22 or extended under s. 24(3). By s. 21 the application had to be made to the respondent being the local authority in question.

By the Local Government Act 1976 (the LGA) s. 10 the local authority consisted of the President and 8 to 24 Councillors appointed by the State Authority. By s. 28 of the LGA the respondent was empowered to appoint Committees. The respondent's says its planning Committee was appointed under this section and consisted of 11 Councillors of whom Khan was one.

Following s. 22(2)(a) and (b) of the Act Mr. Das submitted that in imposing the second condition the respondent mandatorily had to take into consideration is the development plan which by s. 2 of the Act was the local plan or the structure plan. He produced for our consideration a document entitled "*Municipal Council of Penang Island - Structure Plan 1987.*"

The statutory sequence by which a draft structure plan becomes a "development plan" or the "structure plan" for the area is as follows. By s. 9 the respondent is required to publicise its draft structure plan to give all interested parties an opportunity to make representations. After this the respondent submits the draft to the State Planning Committee **(the Committee)** for approval (s. 10(1)). Section 10(6) and (7) read:

> (6) Upon approving a draft structure plan, the Committee shall submit it to the State Authority for the assent of the State Authroity to the plan, and upon the assent being given, the plan shall come into effect.
>
> (7) The Committee shall cause the fact of assent of the State Authority to a draft structure plan to be published in the State *Gazette* and in at least two local newspapers, one of which being in the national language, together with the marking by which the plan may be identified and a statement of place where the plan may be inspected.

After Mr. Sethu's challenge to the admissibility of the "Structure Plan 1987" Mr. Das provided the following additional information.

On 15 September 1987 the respondent printed a "Draft Structure Plan" (the "Blue Book") and submitted it to the State Planning Committee. This committee approved the "Draft Structure Plan 1987" as provided by s. 10(1). The respondent had given the required publicity under s. 9(2) of the Act on 16 September 1987. An inquiry committee was appointed and objections were heard from 1 to 5 December 1987. Having approved the Draft Structure Plan 1987 the State Planning Committee forwarded the same with a covering letter dated 23 October 1989 to the State Authority. By a letter dated 13 January 1990 the State Secretary informed the Director of the State Planning Committee that the State Authority had given its assent on 20 December 1989.

On 21 May 1990 public notices were published in the New Straits Times and the Utusan Malaysia that the assent under s. 10(6) had been given to the "draft structure plan identified as Municipal Council of Penang Island Structure Plan 1987" which could be inspected at the counter of the City Hall. On 14 June 1990 a publication appeared in the Penang *Gazette*. The cover page of this *Gazette* refers to **"Draft Structure Plan 1989"** (Emphasis supplied). The body of the actual *Gazette* no. 185 recites the Act s. 10(1) and is headed **Draft Structure Plan 1987**. It contains a foreword from the President of the respondent and runs from pp. 237 to 513 - it is a very detailed document both in Bahasa Malaysia and English. Following on this Mr. Das says the respondent published its Green Book "Structure Plan 1987". Housing is covered under Chapter 4 pp. 31 to 37. Item 4.1(iii), 4.3.2(v) and 4.3.3(i) reads:

4.1 PLANNING ISSUES

iii) **the need to control the high price of housing**

The price of housing in Penang is very high compared to the general affordability level of the people although prices of houses have dropped since 1983. The projection of housing needs by different income groups shows that about 30% of the households can only afford to buy housing units costing RM25,000 or less per unit, and a substantial percentage of households (10% to 20%) cannot afford to buy the housing unit even if it was priced at RM25,000. (See appendix III, table III).

4.3.2 ADOPT APPROPRIATE MEASURES TO ENCOURAGE AND ASSIST IN THE DEVELOPMENT OF LAND FOR HOUSING DEVELOPMENT

v) **giving incentives to private developers to build low cost housing:**

It has been estimated that up to 30% of the island's households can only afford the low-cost housing units i.e., houses costing RM25,000 per unit and less. (See appendix III, table III). The State Authority requires a certain proportion of housing units in private housing development schemes to be of low cost in view of the substantial need.

To complement, as well as, to consolidate this policy of low-cost housing production, the MPPP shall give incentives to private developers in the form of the following:

a) granting of higher densities of development;

b) giving priority in plan processing and approval;

c) provision of standard building plans for low-cost flats and other low-cost housing units; and

d) reduction of development charges.

4.3.3 TO TAKE APPROPRIATE STEPS FOR THE PROVISION OF HOUSING FOR THE LOW INCOME IN LINE WITH THE CURRENT STATE POLICIES.

MPPP recognises the need to provide adequate housing especially for the low income group. In order to achieve this MPPP shall continue such efforts in line with the current state policies.

Towards this end MPPP shall undertake the following:

i) To ensure that a minimum of 30% is allocated for low cost housing for all housing schemes or whichever is determined by the State Authority.

We will assume that this Green Book was published in 1990. We think some attention should be focussed on the fact that RM25,000 in the above passages refers to "**houses**" or housing units as opposed to low-cost **flats** and the need to provide such housing for the **"low-income group"**.

The basis of Mr. Sethu's objection to this Green Book is that contrary to s. 10(7) of the Act "the fact of assent by the State Authority to the draft structure plan" was never "published in the State *Gazette*" and therefore in law this draft structure plan never became the structure plan and has no legal effect.

There was then a contest with Mr. Das saying that the requirement in s. 10(7) was merely procedural and directory. Mr. Sethu said it was mandatory. He referred to *Cheong Seok Leng v. PP* [1988] 2 MLJ 481, and s. 61 of the Interpretation Act 1948 and 1967. Furthermore the *Gazette* of 14 June 1990 was not published by the State Planning Committee but by the respondent's President. An added discomfiture here is that the plan referred to on the *Gazette* title page is a **Draft Structure Plan 1989** whereas the first page of the *Gazette* refers to a **Draft Structure Plan 1987**.

In the face of these difficulties we have to ask ourselves where did the "Guidelines for the development of low-cost flats" come from? The printed copy provided by the appellant (p. 652-656 of the appeal record) says they were passed on 7 December 1978 and 12 March 1983 i.e., before the Act came into force in Penang on 1 January 1985. As to the cost it says *"lebih kurang"*. There is no reference to 30%. The typewritten list attached to the respondent's letter to the appellant dated 18 June 1991 (p. 680 of the appeal record) is not called guidelines but *"Kehendak-kehendak Perancang Bandar"* and the letter describes the document as "the requirements of the Town Planning Department, the Building Department, the Engineering Department and the Health Department of the City Council."

We think that despite Mr. Sethu's criticisms the Draft Structure Plan 1987 did come into effect on 20 December 1989 not only by virtue of the provisions of s. 10(6) but also by virtue of the definition s. 2 which refers to a structure plan "having effect by virtue of **s. 10(6).**

However "guidelines" are only a statement of principles pointing the general direction. In the absence of any suggestion from the respondent that they were repealed we must act on the basis that the said guidelines passed on 12 March 1983 were still in force in 1991. These guidelines clearly permit some flexibility in the cost of low-cost flats - *"lebih kurang RM25,000"*. Against this backdrop the "Requirements of the respondent's list of 18 June 1991" cannot be treated as non-negotiable.

We do not think it was ever the policy of the State Authority that private developers should build houses at a cost of say RM38,000 each to themselves and sell them at RM25,000. The paragraphs from the Green Book we have extracted and upon which Mr. Das so heavily relies requires the respondent to give incentives to developers to make it possible for them to sell off 30% of the total development at RM25,000 each when the incentives given have made the whole project financially feasible from the costs recovered from the sale of the balance of the 70%.

In an appropriate case we think it would be quite in order for such a requirement to be imposed as a condition to the grant of planning permission, but obviously this calls for an overview of the total cost of construction and projected profits.

The crucial considerations here are that the respondent knew on 6 September 1991 that the proposed price was RM32,000 and RM45,000. The respondent knew that the appellant did not agree to the requirement 11 in the respondent's list of 18 June 1991 that the price should not exceed RM25,000. They also knew that these prices were a private internal arrangement between the members of a co-operative and the party they had chosen as their developer. In other words the price had been agreed by the prospective purchasers through their lawfully elected representatives. With all this knowledge the fact is that the responded did **not** make it a condition then that 30% of the 183 flats (i.e., 55 flats) approved should be sold at a cost not exceeding RM25,000. The wording of s. 22(3) of the Act makes it crystal clear that to amount to a **condition** it must be so incorporated as to make the planning permission granted subjected to such condition and that such condition must appear in the prescribed form (s. 22(6)).

On the assumption that the respondent had a power to impose such a condition that power was not exercised on 6 September 1991. Nor was it exercised after some of the appellant's members petitioned the respondent that further increase was proposed. Indeed the respondent formally represented to the appellant's members, its architect and to the appellant itself by letter dated 24 February 1992 that the matter had been considered at a Municipal Council meeting no less on 13 February 1992 which had decided that the increased prices were purely an internal matter for the appellant (p. 776 of the appeal record). The aggrieved members did not appeal nor did anyone else complain about this decision.

The submission made by Mr. Das that because this project was described in so many words in the said planning permission as "1 block 10 storey low cost flats 183 residential units and 7 shop units" it necessaily followed that the units must be sold at not more than RM25,000 because low-cost means not more than RM25,000 cannot be right because such a view cannot be reconciled with the respondent's Council's decision of 13 February 1992.

Fifth Issue

Did the Respondent Have a Legitimate Expectation to Have the Said Planning Permission Renewed on the Same Terms for Another Year? Was the Respondent Guilty of Abuse of Power or Error of Law in Imposing the Second Condition?

It was once thought and indeed Mr. Das submitted that a legitimate expectation consisted only of an aggrieved person's right to be heard before a decision was taken which was adverse to his interests. With respect the law has come very much further than that.

The most recent exposition of this concept is to be found in the judgment of Simon Brown LJ in *R. v. Devon C.C. ex parte Baker* [1995] 1 All ER p. 73 at pp. 88 and 89. We think it should be set out here in full:

> What this case concerns is the administrator's duty to act fairly and in accordance with the procedural proprieties. How is the extent of this duty to be ascertained?
>
> Much of the argument before us, not only in the *Devon* case but also in the *Durham* case, centred upon the concept (doctrine, principle, call it what one will) of legitimate expectation. This concept, as it seems to me, has now become so widely and variously invoked that it is time to examine what actual assistance can be derived from it, in particular in situations such as arise here in *Durham.*
>
> It is first, I think, convenient to identify, at least in broad categories, various of the distinct senses in which the phrase 'legitimate expectation' is nowadays used.
>
> (1) Sometimes the phrase is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him. It was used in this sense and the assertion upheld in cases such as *R v. Secretary of State for the Home Dept, ex parte Ruddock* [1987] 2 All ER 518, [1987] 1 WLR 1482. It was used in the same sense but unsuccessfully in, for instance *R v. Board of Inland Revenue , ex parte MFK Underwriting Agencies Ltd.* [1990] 1 All ER 91. [1990] 1 WLR 1545 and *R v. Jockey Club ex parte RAM Racecourses Ltd.* [1990] [1993] 2 All ER 225. The various authorities show that the claimant's right will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it. The doctrine employed in this sense is akin to an estoppel. In so far as the public body's representation is communicated by

way of a stated policy, this type of legitimate expectations falls into two distinct sub-categories: cases in which the authority are held entitled to change their policy even so as to affect the claimant, and those in which they are not. An illustration of the former is *R v. Torbay BC ex parte Cleasby* [1991] COD 142; of the latter *ex parte Khan.*

(2) Perhaps conventionally the concept of legitimate expectation is used to refer to the claimant's interest in some ultimate benefit which he hopes to retain (or, some would argue, attain). Here, therefore, it is the interest itself rather than the benefit that is the substance of the expectation. In other words the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision. Of the various authorities drawn to our attention, *Schmidt v. Secretary of State for Home Affairs* [1969] 1 All ER 904, [1969] 2 Ch 149, *O'Reilly v. Mackman* [1982] 3 All ER 1124, [1983] 2 AC 237 and the recent decision of Roch J in *R v. Rochdale Metropolitan BC ex parte Schemet* [1992] 1 FCR 306 are clear examples of this head of legitimate expectation.

(3) Frequently, however, the concept of legitimate expectation is used to refer to the fair procedure itself. In other words it is contended that the claimant has a legitimate expectation that the public body will act fairly towards him. As was pointed out by Dawson J in *A-G for New South Wales v. Quin* [1990] 93 ALR 1 39 this use of the term is superfluous and unhelpful: it confuses the interest which is the basis of the requirement of procedural fairness with the requirement itself:

> No doubt people expect fairness in their dealings with those who make decisions affecting their interests, but it is to my mind quite artificial to say that this is the reason why, if the expectation is legitimate in the sense of well founded, the law imposes a duty to observe procedural fairness. Such a duty arises, if at all, because the circumstances call for a fair procedure and it adds nothing to say that they also are such as to lead to a legitimate expectation that a fair procedure will be adopted.

(4) The final category of legitimate expectation encompasses those cases in which it is held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some specific promise or practice. Fairness requires that the public authority be held to it. The authority is bound by its assurance, whether expressly given by way of promise or implied by way of established practice. *Re Liverpool Taxi Owner's Association* [1972] 2 All ER 589, [1972] 2 QB 299 and *A-G of Hong Kong v. Ng Yuen Shiu* [1983] 2 All ER 346, [1983] 2 AC 629 are illustrations of the Court giving effect to legitimate expectations based upon express promises; *Council of Civil Service Unions v. Minister for the Civil Service* an illustration of a legitimate expectation founded upon practice albeit one denied on the facts by virtue of the national security implications.

> Let me acknowledge at once that the above is by no means an exhaustive analysis of the concept of legitimate expectation; anyone interested in that should study instead Mr. Paul Craig's illuminating article '*Legitimate expectations: a conceptual analysis*' (1992) 108 LQR 79, rather it is attempt at a broad categorisation which may, I hope, clear away some at least of the many semantic confusions that have bedevilled this area of our law.

Taking this concept in the first sense the said planning permission granted the appellant a substantive right. The respondent's Council's decision of 14 February 1992 was a clear unambiguous representation that the appellant was not pegged to selling its units at prices not exceeding RM25,000. The appellant relied on the representation and in accordance with its internal procedures fixed the **new** prices at which the units would be sold and proceeded to sell them. Since the respondent was fully aware of these prices and had stated a Council's decision that the prices were an internal matter for the appellant we are of the view that the respondent was not entitled to change its decision so as to adversely affect the claimant. There is an estoppel here.

In the second sense we think that the respondent should have given advance notice of its intention to impose the second condition because the rules of natural justice demanded it. It is very possible that if a fair opportunity had been given to make representations the second condition would not have been imposed on 20 July 1993.

In the third sense we think that it cannot be said that the respondent acted fairly in this case (we will come back to the question of bias and Khan's involvement later) because the decision making process is shown to be fatally flawed by the reasons which the respondent's planning director Mr. Tan subsequently advanced to justify the imposition of the second condition.

We need to emphasise here that there is a statutory requirement that the proceedings of all the respondent's committee meetings to be minuted. No minutes have been produced of the meetings on 20 July 1993, 5 September 1993 or 20 September 1993 at which the appellant's request for extension was entertained, and its appeal for reconsideration rejected. Why it took almost 11 months to consider the extension, what views were expressed by the Councillors at these meetings, for the imposition of the second condition and the rejection of the appeal has not been disclosed to the Court.

What the planning director subsequently affirmed the second condition to mean is a matter for some astonishment. By July 1993 the appellant had sold 70 out of the 110 two-bedroom units at RM35,000 each. So there were 40 left. Out of the 83 three-bedroom units it had sold 33 at RM62,000 each. The heading to the respondent's letter dated 30 July 1993 imposing the second condition refers specifically to the said planning permission, this project of 190 units and the said land. The plain meaning of the letter was that 30% of these units should be built and sold at RM25,000 per unit. The appellant's appeal

letter of 10 August 1993 makes it clear that this was the sense in which the second condition was understood by the appellant. It was pointed out that it was practically impossible to turn the clock back and fulfill such a condition. The appellant pointed out that the format of the approved plans and its cost structure for the existing project could not be changed without great financial loss. The respondent's planning director who replied on 23 September 1993 did not suggest that the appellant had misunderstood his meaning. The rejection was unqualified and absolute and the second condition was reaffirmed in the same terms.

After the proceedings were commenced, the respondent's planning director filed an affidavit sworn on 10 November 1993. In this he stated (p. 389 of the appeal record) that the intended meaning of the second condition was not that 30% of the 190 units should be sold below RM25,000 each but that since in accordance with State Policy "30% of low cost houses contributed must be sold at RM25,000 per unit" the appellant was permitted to build a further 30% residential units for sale at RM25,000 excluding the proposed number of residential units which had been approved based on the maximum permitted density. He further stated that the appellant had thus been given a choice of adding 55 residential units to the 183 units which had been permitted.

Taken at face value what this means is that 238 units were now to be built on the said land. Such a requirement would have violated s. 18 of the Act and the respondent's own statutory limitations on density which had a maximum of 100 units per acre. The entire project would thus have had to be radically altered because in accordance with the said planning permission, the RC plans, sewerage plans, plumbing and drainage had already been submitted on the basis of 190 units and approved as such.

The point here is that the appellant had not applied for a variation of the planning permission but only for an extension. It was too late to change the pricing of the existing 190 units. By seeking to compel the appellant to build another 55 units, the respondent was not granting an **extension** of the planning permission granted for 190 units, but forcing the appellant to put up a new project for 238 units on the said land.

Whilst the intentions of the respondent in seeking to make available to the public low-cost flats at RM25,000 is quite laudable we do not think this is the right way to go about it. There are strong parallels here with in *R. v. London Borough of Hillingdon ex parte Royco Homes Ltd.* [1974] 2 All ER 643 where a planning authority in effect required a developer to assume at its own expense a significant part of the duty of a local authority to provide accomodation to persons on the housing authority's waiting list.

The relevant words in s. 24(5) are "In granting an extension ... the local authority may impose such condition on **the planning permission** as it thinks fit or vary the conditions originally imposed ..."

The planning permission here was for 190 units only and the new conditions imposed had to relate to those 190 units. The words "as it thinks fit" in planning legislation cannot be given their literal meaning so that the planning authority can do as it pleases. As Lord Denning said in *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1958] 1 QB 554:

> The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that these conditions, to be valid, must fairly and reasonably relate to the **permitted development.** The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest (Emphasis added)

This principle has been followed by a long line of authority since then and is well established in our law. On the facts we are constrained to hold that in imposing the second condition the respondent committed an error of law, and that the manner in which the respondent went about it constituted an abuse of power.

Sixth Issue

Did the Conduct of Miftah Khan Vitiate the Decision and If So To What Extent?

These facts are admitted by Miftah Khan:

(1) he is Rabeah's uncle;

(2) he attended a meeting of the appellant on 15 June 1993:

(3) he did so to negotiate the best terms for Rabeah's vacating the site.

(4) he disclosed at that meeting that he was a Municipal Councillor;

(5) he rejected the terms offered by the appellant and asked for a three-bedroom flat;

(6) he attended every meeting of the respondent in which the appellant's planning permission was discussed i.e., 5 September 1991, 20 July 1993, 5 September 1993 and 20 September 1993 and participated therein.

These facts were alleged by the appellant's secretary which Miftah Khan did not admit and/or deny:

(1) that the appellant's offer to Rabeah was the sale of one two-bedroom unit at a cost of RM35,000 less 20% or alternatively to build a wooden house on the said land alongside the LLN reserve:

(2) that at the meeting Khan said after disclosing he is a Municipal Councillor that he could jam the project and demanded one two-bedroom unit free;

(3) that on account of this threat the appellant offered Rabeah one two-bedroom unit free;

(4) that Rabeah subsequently refused to sign the written agreement because Miftah Khan had told her not to sign till the appellant's building plan had been renewed and that he was recommending additional conditions.

Mr. Das submitted that since the negotiations carried out by Khan on 15 June 1993 had resulted in a free house for Rabeah in any event there was no correlation or *nexus* between the free house and the second condition. Secondly he submitted that prior to 20 July 1993, 5 or 20 September 1993 the respondent had not conducted itself in such a way that it could not have exercised a proper discretion. Thirdly he says that the proper test as to whether we should interfere is whether a reasonable man appraised of all the matters in evidence before the respondent's planning committee would have a reasonable suspicion of bias or in other words whether in reality the planning authority had genuinely and impartially exercised its discretion. Lastly he says it is too much to say that Khan imposed the condition and that it was there from 1991.

As we have already stated, our perception is that in 1991 the said planning permission was unqualified except as to the seven conditions stipulated and that there is no explanation for the long delay in considering the application for extension. On 15 June 1993 that application was still pending with no indication when it would be heard.

We cannot simply brush aside the serious allegations made by the appellant's secretary of Khan's behaviour on 15 June and that the appellant was intimidated into upping the ante from RM7,000 to RM35,000.

Khan says he asked for a three-bedroom flat but also says no agreement was reached at the meeting. In his affidavit dated 10 November 1993 Khan deposed further (p. 377 of the appeal record) that a week after this meeting at the request of the respondent's secretary Mr. Lakhbir Singh Chahl a further meeting took place between him (Khan) and Mr. G. Rethinasamy who agreed to substitute a three-bedroom flat, that Khan accepted this offer but clarified that Rabeah's house should only be demolished after the appellant's building plan was approved by the respondent.

R. v. Amber Valley District Council ex parte Jackson [1984] 3 All ER p. 501 is significant to the extent that after *Lower Hull City Council v. Bank* [1974] 1 NZLR 545 was brought to his attention. Woolf J agreed that the test propounded as to whether there was a real likelihood of bias in *Metropolitan Properties Co. (FGC) Ltd. v. Lannon* [1968] 3 All ER 304 [1969] 1 QB 577 applies equally to bodies carrying out administrative functions as it does to those carrying out judicial functions. To our mind it is clear from the sentence at p. 508J that if there had been an allegation "that any individual district councillor had some personal financial interest" Woolf J would have granted *certiorari*.

The facts in *R v. Sevenoaks District Council ex parte Terry* [1985] 3 All ER 226 are far removed from ours. That case concerned a district council developing its own land. All the formalities in calling for tenders had been scrupulously observed and planning permission was given to the developer who had submitted the successful tender. There was no question of bias. *R. v. St. Edmundsbury Borough Council* [1985] 3 All ER 234 was also a case of a borough council applying to itself as the local planning authority for the grant of planning permission to itself to erect a supermarket on its own land. It was contended that there was no bias on the part of the council and the test there proposed must be viewed in this setting. This is spelt out at p. 235:

> (3) The test of what a hypothetical reasonable man would apprehend had no application in determining the validity of an administrative decision such as the grant of planning permission. The sole test was whether, despite its interests or its previous actions, the planning authority genuinely and impartially exercised its discretion, since there were many cases in which a local authority's own interests and land were likely to be affected by a favourable planning decision made by it. Accordingly, once a planning authority's decision was found or conceded to be fair there was no requirement to pose some further test by which the decision might be impugned as unlawful or void, either by reference what the reasonable man would suspect or by reference to whether viewed through some other eyes, such as those of the Judge, there was a real likelihood of bias. Since it was conceded that there was no bias on the part of the council, its decision could not be impugned on the grounds that it might have given rise to a reasonable suspicion of bias, but in any event a reasonable man knowing all the facts would have reached the conclusion that the council's decision was fair (see p. 255 c to e and p. 256 b c and f g post): *dictum* of Glidewell J in *R v. Sevenoaks DC ex parte Terry* [1985] 3 All ER at 233 applied: *Steeples v. Derbyshire CC* [1984] 3 All ER 468 not followed.

We do not find this test at all helpful in our present situation and we do not think it should in any way be allowed to blur the primary duty of any person in authority who has to decide any matter which affects the fate or fortunes of others. Section 34(1) of the Local Government Act provides as follows:

34. **Disability of Councillors for voting on account of interest in contracts etc.**

(1) If a Councillor has any pecuniary interest, direct or indirect in any contract or proposed contract or other matter and is present at a meeting of the local authority or of any Committee thereof at which the contract or other matter is the subject of consideration, he shall, as soon as possible after the commencement thereof; disclose the fact and shall withdraw from the meeting while the contract or matter is under consideration:

> Provided that this section shall not apply to an interest in a contract or other matter which a Councillor may have as a rate-payer or inhabitant of the local authority area, or as an ordinary consumer of water, gas, electricity or other local authority services or to an interest in any matter relating to the terms on which the right to participate in any local authority service, including the supply of goods, is offered to the public.

The source of these safeguards is rooted in a fundamental principle that is as old as *homo sapiens*. It was articulated in the legal maxims *nemo debet esse judex in propria sua causa* (no man can be judge in his own cause) and its companion *nemo sibi esse judex vel suis jus dicere debet* (no man ought to be own judge, or administer justice in cases where his relations are concerned). How harshly the law views a proven breach of these principles was demonstrated by the conviction of the Mayor of Malacca for merely agreeing with the recommendations of his technical committee to pass the plans of a company without disclosing that he was a minor shareholder. (See *PP v. Datuk Tan Cheng Swee & Anor*. [1979] 1 MLJ 166; [1980] 1 MLJ 117 [1980] 2 MLJ 276).

Since the allegations of Khan's pressure and his denials were contained in contested affidavits it is not possible to make any finding without a trial as to where the truth lies. What we are concerned with here however is not whether there was actual bias on the part of Khan but whether even if Khan was as impartial as could be, right minded persons would think there was likelihood of bias on his part. With respect we think Lord Denning's test in *Metropolitan Properties Ltd. v. Lannon* [1968] 3 All ER 304 at 309 is still the best. To bring home the point to everyone concerned in public administration we are reproducing here what he said (at pp. 309 and 310):

> So far as bias is concerned, it was acknowledged that there was no actual bias on the part of Mr. Lannon, and no want of good faith. But it was said that there was, albeit unconscious, a real likelihood of bias. This is a matter on which the law is not altogether clear, but I start with the of repeated saying of Lord Hewart CJ in *R. v. Sussex Justices, Ex p. McCarthy* [1923] All ER Rep. 233 at p. 234; [1924] 1 KB 256 at p. 259:
>
> > ... it is not merely of some importance, but of fundamental importance that justice should both be done and be manifestly seen to be done.

> *R. v. Barnsley County Borough Licensing Justices, ex parte Barnsley & District Licensed Victuallers Assocn.* [1960] 2 All ER 703 at pp. 714, 715; [1960] 2 QB 167 at p. 187 Devlin LJ, appears to have limited the principle considerably but I would stand by it. It brings home this point; in considering whether there was real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then should not sit. And if he does sit, his decision cannot stand: see *R. v. Huggins* [1895-99] All ER Rep. 914; [1895] 1 QB 563; *R. v. Sunderland Justices* [1901] 2 KB 357 at p. 373 per Vaughan Williams LJ. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. See *R. v. Camborne Justices, ex parte Pearce* [1954] 2 All ER 850 at pp. 8; [1955] 1 QB 41 at pp. 48-51; *R. v. Nailsworth Justices, ex parte Bird* [1953] 2 All ER 652. There must be circumstances from which a reasonable man would think it likely or probable that justice, or chairman, as the case may be, would or did favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: "The Judge was biased"

Lannon's only sin was that one of the tenants affected by the decision of the committee was his father. It was acknowledged that there was no want of good faith or actual bias on his part. In the case before us serious allegations have been made that Khan had used his official position for the benefit of his niece. True they are only allegations but they are there and have been made on oath.

Lord Denning's judgment was very recently followed by this Court of Appeal in *Hock Hua Bank (Sabah) Bhd. v. Yong Liuk Thin & Ors.* [1995] 2 MLJ 213 where YA N.H. Chan analysed the leading authorities on this subject. He said at p. 226F that the law assumes bias where a Judge has a direct pecuniary or proprietary interest in the subject matter of the proceeding. At p. 228E he concluded:

> To disqualify a Judge, there must be circumstances or facts which have been shown to exist which would lead a reasonable and fair-minded onlooker to think or which would have given reasonable ground for him to suspect that the case would not be decided according to evidence.

The facts are, that unless Rabeah vacated the appellant could not start work, that by June 1993 the appellant had already been kept waiting for 10 months for their application for an extension to be dealt with, that their discount worth RM7,000 had been rejected, that Khan demanded a three-bedroom flat and that by 20 July 1993 Rabeah had not agreed to anything. Khan's reference to his acceptance of Rethiko's offer in the presence of the Municipal Secretary and his caveat that Rabeah's premises should not be demolished until the plans

were approved is not irrelevant. According to him this took place around 22 June 1993. The appellant only sent Rabeah their signed agreement for a two-bed room flat on 1 September 1993 which she did not accept. Khan wanted a three-bed room flat. Khan then sat at a sub-committee meeting on 5 September rejecting the appellant's appeal and again on 20 September 1993 at the full committee meeting which rejected the appeal. It will be recollected that the extension granted on 20 July 1993 expired on 5 September 1993. Reasonable people might well think it a proper inference from these facts that Khan was biased.

It is the opinion of this Court that in the first place Khan should never have participated in the negotiations on behalf of Rabeah. He cannot be equated to a split personality who is only an interested uncle when talking to the appellant on her behalf and a disinterested councillor when participating in the council meetings. Once he took on the role of Rabeah's champion he should not have sat at the meeting on 20 July or 5 September or 20 September 1993. At the very least he should have declared his interest as required by s. 34(5) of the Local Government Act which reads:

> **34. Disability of Councillors for voting on account of interest in contracts, etc.**
>
> (5) The secretary shall record in a book to be kept for the purpose particulars of any disclosure under subsection (1) and of any notice given under subsection (4), and the book shall be open at all reasonable hours to the inspection of any Councillor.

The respondent's failure to produce the minutes of these meetings does not help the respondent's case.

Seventh Issue

Was the Conduct of the Appellant Such That Discretionary Relief Should Be Refused?

The initiation of these proceedings and the allegations against Khan undoubtedly goaded the respondent to mount not just a defence but an all out counter attack on the *bona fides* of the appellant.

We have not been able to see anything sinister about the commercial arrangements the appellant made with Rethiko, nor do we view some clerical discrepancies in the specimen sale and purchase agreement entered into as having any materially adverse effect on their cry for justice.

Regulation 5 of the Housing Developers Act (Control and Licensing) Regulations 1989 states that no advertisement or sale shall be made by a licensed housing developer without an advertisement and sale permit having first been obtained from the Controller of Housing. Regulation 5(5) states that such a permit shall not be issued for any housing development in respect of which the licensed housing developer is not the proprietor of the land concerned

but this provision is not to apply if the land owner has executed an agreement with the developer to sell the land for the purpose of the development **and** the land owner agrees to abide by reg. 10. This reg. 10 prohibits the developer from entering into any contract of sale unless the land owner is also a party thereto.

Clause 15 of the said agreement between the appellant and Rethiko specifically provided that both parties will comply with these regulations. On 20 December 1991 the Controller issued Rethiko with a licence under reg. 3(6) and as provided by s. 5 of the Housing Developers (Control and Licensing) Act 1966 to proceed with the project (p. 578 of the appeal record).

Despite this at the second hearing before the Judge the respondent's planning director raised an issue that this project was illegal because no permit had been obtained for the sale of the units in question and that since the licence under s. 3(1) had been issued to Rethiko a sale permit should have first been obtained by them under reg. 5

The Judge did not deal with this point. It was canvassed before us by Mr. Das who contended that even if a case had been made out on the other grounds relief should be refused because the appellant had not come with clean hands. He referred to *Badat bin Drani v. Tan Kheat* [1953] MLJ 67.

With the greatest respect we cannot countenance this argument which seems to have an element of desperation about it. Section 2(2)(a) of the Housing Developers (Control and Licensing) Act 1966 categorically states that, "Nothing in this Act shall apply to one society ... incorporated under any law relating to co-operative societies". These sales were direct sales by the appellant to its members and since the land was at all times vested in the appellant the transfer of title would have moved from the appellant to the purchaser. Rethiko was only being paid for goods and services rendered. There is nothing in this point.

Eighth Issue

What Should be the Form of Relief Sought?

Mr. Das contended that if we were minded to grant relief the whole of the decision should be quashed and not just the second condition. He says the decision cannot be severable. He also submitted that the entire matter should be referred back to the respondent for reconsideration.

We think that a distinction should be made here between the said planning permission, the seven conditions to which it was originally subject, and the additional conditions imposed. We also think a distinction should be drawn between that which is void and that which should be cured by judicial review. *Hall and G. Ltd. v. Shoreham By-Sea UDC* [1964] 1 All ER 1 is an example of the planning permission having to be avoided because the offensive

conditions were fundamental and inseparable from it. *DPP v. Hutchinson* [1990] 2 All ER 836 dealt with the severability not of planning conditions but of a bye-law, parts of which exceeded the powers conferred by the empowering statute. We accept and adopt the statement in *Administrative Law* by Sir William Wade 6th Edn., p. 338 reading as follows:

> An administrative act may be partially good and partially bad. It often happens that a tribunal or authority makes a proper order but adds some direction or condition which is beyond its powers. If the bad can be cleanly severed from the good, the Court will quash the bad part only and leave the good standing.

The attack here was only against the second condition. It is severable from the rest of the said planning permission. But merely quashing it will not answer the needs of justice in this case. Section 24(4) of the Act requires a planning permission extended under s. 24(3) to remain valid for 12 months **from the date of the extension thereof.** In our view, the date of the extension is the date on which the permission was extended and not the date on which previous permission lapsed. Therefore the respondent also did wrong in making a retrospective order instead of extending the planning permission from 20 July 1993 to 19 July 1994. Article 8 of the Schedule to the Courts of Judicature Act 1964 provides us with the following additional power:

> **8. Time**
>
> Power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, although any application therefor be not made until the expiration of the time prescribed.
>
> Provided that this provision shall be without prejudice to any written law relation to limitation.

We must do what the respondent ought to have done if it was fair. For all the reasons we have heretofore given on each of the issues raised before us we now allow this appeal. The decision of the Judge in the Court below is set aside. We hold that the respondent committed an error of law in imposing the second condition on 20 July 1993 and in failing to abrogate it on 20 September 1993. Accordingly we make an order in terms of the first prayer of the appellant's substantive motion dated 4 March 1994.

We further order that the said planning permission granted on 6 September 1991 without the second condition in the respondent's letter dated 30 July 1993 (i.e., the words *"(ii) Menyediakan 30% kos rendah atas harga RM25,000 seunit")* be and is hereby extended for one year from the date of the service on the respondent of the order extracted pursuant to this judgment.

Finally we order that the appellant's deposit for security for costs be returned to the appellant and that the costs of this appeal and all costs incurred in the Court below be taxed and paid to the appellant by the respondent.

This has been perhaps one of the most complex appeals which we have had to deal with since this Court was constituted. We wish to record here our indebtness to all the Counsel and solicitors on record for the meticulous way they have assisted us in our deliberations.

Reported by W.A. Sharif